“It Doesn’t Hit the Scorecard”: The Corporate (Un)Accountability and Legal Crisis Accounting of Chiquita Brands’ Crimes in Colombia

By:
Jeanine Legato

Advisor:
Marta Cabrera

Maestría en Estudios Culturales
Facultad de Ciencias Sociales
Pontificia Universidad Javeriana
Bogotá
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Yo, Jeanine Legato, declaro que este trabajo de grado, elaborado como requisito parcial para obtener el título de Maestría en Estudios Culturales en la Facultad de Ciencias Sociales de la Universidad Javeriana es de mi entera autoría excepto en donde se indique lo contrario. Este documento no ha sido sometido para su calificación en ninguna otra institución académica.

Jeanine M. Legato
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ABBREVIATIONS

AFL-CIO	The American Federation of Labor and Congress of Industrial Organizations
ATS	Alien Tort Statute
AUC	Autodefensas Unidas de Colombia (United Self-Defense Forces of Colombia)
CCR	Center for Constitutional Rights
CIA	Central Intelligence Agency
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FTO	U.S Department of State Designated Foreign Terrorist Organization
DOJ	Department of Justice
DOS	Department of State
FBI	Federal Bureau of Investigation
GCC	Global Capitalist Class
ICC	International Criminal Court
JEP	Jurisdicción Especial para la Paz (Special Jurisdiction for Peace)
ICESCR	International Convention of Economic, Social, and Cultural Rights
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IL	International Law
JSC	Joint Stock Corporation
NGO	Non-governmental Organization
NSA	National Security Archive
SCOTUS	Supreme Court of the United States
SEC	Securities and Exchange Commission
SLC	Chiquita Special Litigation Committee
TVPA	Torture Victims Protection Act
UN	United Nations
U.S	United States

A Note on Translation

I wish to thank my professors and classmates at Universidad Javeriana for graciously reading my research in English, my mother tongue. I am aware that such a choice is not apolitical, given the privileged position of my first language in academia and the world at large. When I began this master's, I had no intention of writing this thesis in anything but Spanish and I have often criticized myself for abandoning that goal. In my daytime hours, I am, after all, a translator committed to bringing Latin American thought into the Anglosphere. I am grateful to my advisor, Marta Cabrera, for her observation that translation far exceeds language; through this thesis, I have found the means to translate myself, to investigate many of the burning questions that took me away from the international solidarity work in which I was previously immersed. In cultural studies, we speak about investigating our disenchantments. My own disenchantments with "international accompaniment," corporate accountability, and the international human rights movement were rooted in the realization that I was a subject of a historical process of which I had no appreciation or knowledge. I have lived for over a decade in Colombia, a decade in which the lines between violence and peace and ethical and unethical activism have become complicated and muddled to me, even as I engaged them. In this thesis, I am concerned with understanding the failures of corporate accountability for Chiquita Brands, but also with wrestling with my own subjectivity as a North American researcher and lapsed corporate accountability activist in relation to that failure. Many gringo "Colombianists" come to this country to study any number of local problems, and some do so reflexively and with great political commitment. When I say I have endeavored to translate myself through this research, I refer to the emotional and political growth I have experienced in trading a prior focus on South American communities and "victims" for North American executives and white-collar criminals connected by the same conflict. This turn mirrors what I have learned in a decade in this adoptive country: *extrañeza* and foreignness, immersion and integration, teach me less about my current surroundings than those that I left. For the opportunity to invert a North > South gaze to a gaze Northward (and inward), as it happens, *desde el Sur*, to deconstruct myself and my position as a researcher and gringa in Colombia, I am indebted to this country and my teachers, some of whom have doctoral degrees and some of whom have no formal education. The opportunity to

write in my first language has greatly aided the quality of this project and my ability to turn inward, and for that I am grateful.

Finally, careful readers will note an important weakness in this research inasmuch as many of its sources come from the English-speaking world. There is a reason for this. As outlined in this thesis, the history of the genesis of the corporate form, international law, and even human rights are rooted in colonial, Anglo traditions that require deconstruction. It is no surprise, then, that much of the available research on these topics comes from Europe, particularly the Netherlands and UK. Histories of the Anglo-Saxon corporate form in relation to the development of the Colombian legal landscape are needed, an endeavor for which I now feel better prepared, as well as for adapting parts of this research to Spanish.

INTRODUCTION

In November 2017, Centro Democrático Senator María Fernanda Cabal became the subject of political parody and public outrage throughout Colombia after stating on a popular radio program that "the banana massacre [of 1928] is a historical myth." In a subsequent statement, the Senator qualified her original remarks, clarifying that a "confrontation" had indeed taken place but that supposed communist posturing, popularized by Gabriel Garcia Marquez in his novel *One Hundred Years of Solitude*, had recast an inevitable military clash with revolting armed banana workers into a massacre.

The political theater that ensued in the wake of these comments was interesting to me, perplexing even, for various reasons. First, because most commentary took the form of defending the probity of the event taking place (irrefutably, it did, even by the account of the Senator). Secondly, the public hang-up on the negation or confirmation of an irrefutable fact reduced political discussion of Cabal's actual message, which was that mass murder by the state of (theoretical or actual) communists is justifiable and banal, hardly the stuff of history books.[1]

Given the cultural significance of United Fruit and its crimes in Colombia, the backlash was not unwarranted or surprising. The comments sections of newspaper articles covering the story were littered with readers comparing the event with more recent atrocities (in Santurban, in Mapiripán), as of yet destined for the same silencing as the mythologized banana massacre of 1928. Which is to say, Cabal's comment struck the nerve of a collectively held notion that forgetting is actively produced in Colombia to extract the real from the world of the real.

The collective sigh over this "Macondization," this public forgetting, this produced amnesia, was neither new nor surprising. The recurrent theme of memory, though predating the 2016 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the Colombian government and FARC, has become a matter of public policy in the post-conflict and therefore, hotly debated in the daily news cycle: for example, in the designation of a historian

[1] This re/framing of the historic event (as well as popular reaction to it) was not at all dissimilar to President Trump's "there are bad people on both sides" comment following the murder of anti-white supremacist protestor Heather Heyer in Charlottesville, VA by a white nationalist. Cabal and Trump's comments were made just a few months apart. Far from a mere coincidence, the political utility of such *deliberately* ignorant commentary relates to what I explore in Chapter 3 in terms of popular or transparent secrecy.

who denies the existence of an armed conflict in Colombia to the Centro de Memoria Histórica, in the polemic attacks on the Jurisdicción Especial para la Paz, and as pertains to Cabal's comments, the ever evasive "terceros" or third party financers or contributors (largely corporate) to the armed conflict.

What was most perplexing to me was the lack of debate Cabal's comment raised about the still current iterations of bananera[2] violence. Afterall, the triumph of the "no" vote a year earlier in the peace process referendum had been bankrolled by various bananeras, an inconspicuous challenge to memory of, and the desire to move beyond, the conflict. Furthermore, Chiquita Brands' admitted financing of paramilitary and guerrilla groups in U.S jurisdiction will necessitate some form of arbitration in Colombia, most likely through ordinary jurisdiction, rather than Transitional Justice (see Chapter 2). While many were quick to associate the mythologization of the United Fruit banana massacre of 1928 with other cases of overlooked violence, the *continuation* of the very violence in question seemed to remain a peripheral issue to the public at large and anecdotal side commentary in the media.[3]

This is particularly curious given that, unlike the 1928 massacre—which, true to Cabal's understanding, lacks sufficient official documentation to resolve some of the particular details of the massacre—Chiquita Brands' (United Fruit's successor) death squad payments are some of the most well documented and judicially investigated corporate crimes in the hemisphere, if not the world.

This paradox raises questions about the relationship between public knowing and myth. On the one hand, the absence of an official archive about the 1928 massacre did not prevent its memorialization in the public consciousness. More importantly—and here Cabal misses an important point—Garcia Marquez's fictionalized account of the massacre did not become a

[2] Bananera is the Spanish term for banana company, which I will adopt here.

[3] For example, an El Tiempo article titled "Historiadores responden a frase de Cabal sobre las bananeras" does not mention Chiquita's more recent crimes (Ravelo Méndez 2017). A historian in a similar conversation in a Revista Semana article mentions Chiquita, but the article features the mention as an afterthought: "También recordó que la compañía Chiquita Brands, que procede de la United Fruit Company, en el 2007 estuvo acusada por la formación de grupos paramilitares, por lo cual, según ella, se demuestra que no solo se trata del pasado sino que son hechos con incidencia en el presente cercano que no se deben ignorar" (Torres Cendales 2017). It should be mentioned, too, that the focus on Chiquita's crimes in this thesis and more broadly is in and of itself a reduction since other bananeras are also alleged to have financed armed groups involved in the armed conflict, including (but likely not limited to) Dole (U.S), Delmonte (U.S) (El Espectador 2008), and Banacol (Colombia) (Comisión Intereclesial 2012).

stand-in for some of the contestable facts of the massacre (ie. how many people were killed). Instead, it memorialized the *very forgetting*[4] of the event, a wound that still holds political significance today. The facts of Chiquita's crimes, on the other hand, are substantiated by varied and vast archives. Yet these facts have not either crossed into the realm of the "real," into public knowing, in spite of their relevance in the post-conflict and for peacebuilding; importantly, their forgetting has not either.

In many ways, this thesis is driven by a dual disillusionment; first, about the failure of meaningful corporate accountability,[5] the legal framework "at the intersections of tort law, human rights law, and criminal law" (Comaroff 2016, 27) that emerged with liberalism and "matured" in the neoliberal era, and, secondly, disillusionment that transparency, when corporate accountability *does* "work," doesn't seem to hold much political weight (even before the emergence of "fake news" and it's proselytizers, like Cabal).

While transitional justice in Colombia stands to revive desperately needed debates about third parties in the armed conflict, and about Chiquita specifically, for the sake of the valuable struggle for memory in Colombia, I believe education about Chiquita's justice record in the United States is essential; for before the Justicia Especial para la Paz (the "JEP", or Special Jurisdiction for Peace), amnesia of Chiquita's crimes was also manufactured there. Embedded in the politics of memory and legal and cultural fact, are important questions about corporate accountability and, especially, how the corporation as a subject of rights and punishment is understood and crafted by the law. As Gwendolyn Gordon points out, "attention to the concept of culture in existing corporate legal scholarship recognizes that culture is important insofar as it helps to understand the behavior of corporations. Deserving of more attention, however, is the

[4] This is not to say that an account of the continued forgetting of Chiquita's crimes has not been recorded or studied. See Jose Alejandro Restrepo's *Musa paradisiaca* (1996, 2016) (and Maria del Rosario Acosta Lopez's 2018 analysis of the same).

[5] Corporate accountability is the field dedicated to ending corporate impunity through the development of hard law mechanisms [as opposed to the soft law methods proposed by the corporate social responsibility (CSR) field] to plug the accountability gap of the corporation's omission as a subject of international criminal law. Its core practitioners are largely lawyers and academics, but its goals bleed into the fields of human rights and business and conflict, as well as into the societies of the victimized individuals and communities it aims to redress. A niche field, corporate accountability is in fact articulated with some of the biggest social problems and social change experiments around the world.

notion that culture might also be central to the question of what the corporation *is*" (Gordon 2015: 3, emphasis my own).

Careful then we must be not to reduce reality to the picture painted by Antonio Caballero in a 2020 column in which he states that *la desmemoria oficial* "quiere eximir también a otros: a los llamados "terceros", que son los civiles implicados en la financiación o la promoción del paramilitarismo: [...] compañías multinacionales como la Chiquita Brands, *condenada en Estados Unidos*, pero no aquí, donde cometió sus crímenes" (Caballero 2020, emphasis my own). Instead, the movement for memory of Chiquita's crimes in Colombia needs to be deeply articulated with the largely failed attempts to hold the company to account in the United States, despite a guilty verdict.

Corporate accountability is, structurally and (perhaps) necessarily, an international pursuit. Having closely followed the ongoing but practically squashed Chiquita litigation in the United States, having lived in Colombia to witness the ever-deflating *terceros* debate, what I aim to do in this investigation is deepen my own understanding of the interrelation between institutionally constructed truth and public truth, the international legal framework of corporate accountability in tension with state (or transitional justice) applications of it, and to question the role of the legal system in fracturing and compartmentalizing corporate violence, as is so apparent in the temporal strait jacket mentioned in the above anecdote about mythologized banana massacre(s) of yore and more recent history.

On my Lacking (?) Law Degree, Connection to the Topic, and Thesis Title

I am not a lawyer, and I have never formally studied law.

Importantly, and as I will explore in this thesis, I, like lawyers, communities, government officials, corporations, and others am a subject of the corporate accountability legal regime in the age of neoliberal human rights.

My interest in business and human rights solidified while working as an "international accompanier"[6] in disputed territories in Colombia, where the symbiotic relationship between

[6] See Peace Brigade International's (for whom I did not work) description of protective accompaniment here: https://www.peacebrigades.org/en/about-pbi/what-we-do/protective-accompaniment (Consulted: 14/15/19

foreign capital and conflict was plain. In each of the regions I worked, there was a foreign-owned company, or handful of them—Drummond, Cerrejon, Colombia Natural Resources, General Motors, Poligrow, Cargill, Banacol (formally Chiquita's Banadex)— whose operations directly violated the human rights of local communities, or indirectly, through the efforts of military and illegal armed groups to either protect or harm said operations. I observed that the communities in which I was working were well versed in many areas of human rights law (ie. free, prior, and informed consent and economic, social and cultural rights), international humanitarian law, and the Colombian civil and criminal codes: Ley 70, Ley 1448, Ley 60-1994, *dominio eminente, leyes de propiedad del subsuelo,* and an exhaustive list of *Autos*—these legal frameworks were as familiar to many social leaders and community members as the *atajos* (short cuts) through 'impenetrable' land (both in terms of the natural landscape and the powers-that-be that make it so). I observed meetings between communities and a host of Colombian government bodies operating within the terrain of these legal guideposts, including the Fiscalía, Defensoría del Pueblo, Autoridad Nacional de Licencias Ambientales (ANLA), Ministerio de Minas y Energía, Ministerio del Interior, various army battalions, Instituto Colombiano de Desarrollo Rural (INCODER), la Unidad Nacional de Protección (UNP), and others. At times, I crossed paths, sometimes words, with people the communities identified as paramilitaries, generally fairly visible in the regions, and (far less pronounced) plain-clothes guerrillas. These actors, like me, are subjects in the "ever mutating kaleidoscope of coalitions and cleavages" of the international legal framework (Comaroff 2006: 27).

Corporations, notably, while the most omnipresent and powerful actor in these territories, were much less accessible. The only exception were painstaking involuntary resettlement meetings with communities who were in the process of being dispossessed, or already dispossessed, of their land for economic projects. At these meetings, I met dozens of Colombian subsidiary representatives—inaccurately titled Community Liaisons, Human Rights Officers, Sustainable & Community Development Officers and, at press events, the occasional Colombian CEO.

These are the many local actors most visible (or visible in absentia) in the most conflict-torn parts of Colombia. Not to mention, of course, a considerable bunch of NGO workers and

"international community" representatives, as in my case, a fact I have only recently been able to historicize and contextualize thanks to the contributions of anthropologists like Gupta and Ferguson (2001).

If Colombian executives were hardly accessible, parent companies and the international executives that represent them are, from the Colombian regions from which they obtain their raw materials and commodities, fully removed.

I became interested in this gap, and all the more so once I became aware of corporate accountability litigators based in the United States, Canada, or European countries who did, indeed, have the ears of the parent companies of subsidiaries based in the Colombian conflict zones in which I was working. While working in accompaniment, I met several lawyers working on Alien Tort Statute (ATS) litigation[7] to bring a few of these companies to justice in the U.S for their foreign operations and alleged (or in the case of Chiquita, admitted) involvement in financing armed conflicts in Colombia and elsewhere. I began to closely follow ATS litigation, anxious to understand the complexities of my home country's jurisdiction over U.S companies committing crimes in Colombia.

Over time, I began to feel tied by the limitations of the largely symbolic value of international accompaniment, not to mention the power dynamics infused in it. In retrospect, much of what I was seeing but not plainly understanding at that time, was that corporate crime is omitted from international law. To understand what accompaniment I could really offer, as a U.S native, and, booned as I was by the considerable legal expertise of Colombian communities without formal legal education, I decided to learn the ins and outs of the international and U.S corporate accountability framework.

[7] "The Alien Tort Statute (ATS) is a United States law that allows non-U.S. citizens to file lawsuits in U.S. federal courts for certain violations of international law" (See Earth Rights International: https://earthrights.org/how-we-work/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/). Torts in the U.S are part of the civil (as opposed to criminal) code. "Alien," of course, refers to the statute's application to foreign nationals. The ATS has a fascinating history that will be explored in this thesis (see Chapter 2). One of the U.S's oldest laws (1789), it was largely unused until the 1980's, when "cause lawyers" (See Chapter 2) revolutionized the use of the law to litigate international human rights breaches in U.S federal court. The ATS was the argumentative basis for much of the Chiquita litigation in the U.S. A 2013 Supreme Court decision debilitated the ATS, with vast consequences for the U.S Chiquita litigation.

What were the other pieces of the picture that I could bring into view, far from, but deeply connected to, the daily reality I witnessed in Colombia of death threats, mass displacement, and bureaucratic red tape? Maybe the ATS held an "answer" for holding corporations to account and remedying victims in Colombia. I began to follow the ATS Chiquita litigation in earnest, for if there were ever a straightforward case, Chiquita was it.

For a short time preceding the privatization of Chiquita through its sale to Culturale Safre, I became the owner of a single share in the company. This afforded me the opportunity to attend the 2013 shareholders meeting and read a letter[8] written by communities in Urabá, who I had personally accompanied, listing demands on the company to participate in justice and reparations. I read this directly to Ed Lonergan, CEO at the time.

In a matter of weeks, I received a check in the mail (a $40 return on my $9 share purchase) following the sale of the company to Cultrale-Safre, and just like that Chiquita went private, bought out by (literally) the world's richest banker. It was a lesson in just how quickly corporate infrastructure shifts (with far-reaching effects on liability) even as the entity remains steadfastly hermetic.

Through these and other similar experiences I was piecing together knowledge, and above all, questions, about the complex ways in which corporate criminal liability is addressed, and the tensions inherent to prosecuting companies whose operations span large swaths of the globe. Frustrated as I was by some of these realities, like most people in the corporate accountability movement, I was convinced that more transparency and evolution in the legal system could address the issue that, nearly two decades into the 2000s, impunity of corporate crime is rampant.

Then, in 2013, a landmark (and controversial) Supreme Court decision made me question that logic. *Kiobel v. Royal Dutch Petroleum* ripped the proverbial "teeth" from the Alien Tort Statute and left the U.S without any legal mechanisms to prosecute U.S corporations for their crimes committed abroad. With this decision, a 225-year-old law was eviscerated, and thirty years of

[8] Comunidades Construyendo Paz en Colombia. 29 September 2014. "Carta a Chiquita Brands" Available at: https://comunidadesconpaz.wordpress.com/2014/09/29/carta-a-chiquita-brands-por-conpaz/ (Consulted: 24/05/2017).

corporate accountability case law was virtually wiped from the slate. It was a promised dead end, for Chiquita's victims and millions of others.

Simultaneously, I despaired over *Citizens United v. Federal Election Commission* (2010) and *Burwell v. Hobby Lobby Stores, Inc*. (2014). These decisions, affirming that corporations had a right to political speech and to practice religion (later I would learn of *Carnell Construction v. Danville,* which established that corporations can have a racial identity) went far in anthropomorphizing the corporate form in the U.S. It seemed corporations were now fully people, with protective rights; but when it came to the *duties* of a corporate political subject before the law, corporations remained faceless, corporate veil intact.

It was at this time that I began to question the narrowness (bordering on myopia) of the legal academic analysis that explained *Kiobel*; I realized the technicalities and interpretive whims as to the directions in which the law hinges require analysis of the cultural inflections it normalizes and weaponizes. As Gwendolyn Gordon has said, we are living in a particularly anthropological moment in corporate law jurisprudence. As I hope to show in this thesis, the hesitation I so commonly hear when, for example, the response to my investigation topic is "but are you a lawyer?" must be dismantled if we are to wrestle with corporate power as a society. How and why the corporation is seen as an object through which accountability can be produced is a question that exceeds the law itself.[9] While I have immersed myself in much of the legal academic literature on Chiquita litigation, and am sure to get things wrong about parts of legal doctrine, my intention with this thesis is to channel the attitude of any of the human rights defenders I've met in Colombia who might answer the question, "but are you a lawyer?" with, "No, y *qué*?" So what?

In cultural studies, I have discovered the productivity of bringing curiosity to my disenchantment with the corporate accountability framework and to Law with a capital L. Furthermore, in cultural studies I have found a conceptual framework to help me parse an ideological tautology that what is needed in corporate accountability is...more accountability (transparency). I believe

[9] My thanks to Alejandra Azuero for this insight.
Azuero, Alejandra, legal anthropologist (2019, August 13, personal interview). Bogotá, D.C

Chiquita litigation tells us a different story, or at least a more complex one. My questions have shifted from 'how can the law bring transparency and illuminate the nexus of business and conflict' to 'in what ways does the law obfuscate and/or reproduce the nexus between business and conflict'?

Three factors— a protracted history of widely documented crime, a public admission of guilt, and the existence of leaked evidence—make Chiquita a particularly productive example for questioning, why, in 2021, is such egregious corporate impunity for crimes against humanity possible?

How has this crisis been managed, and what does the law have to do with it?

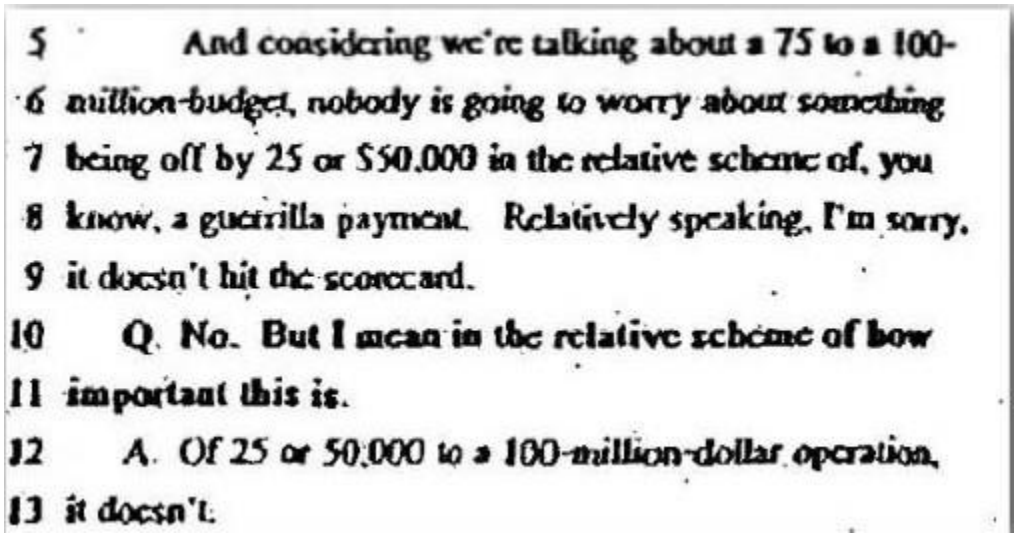
Furthermore, what does the (so far) prolonged impunity of Chiquita mean for our social movements? If the revelation of Chiquita's crimes did not portend justice, but did *redistribute* (Bratich 2007) public knowing, then how effective is our emphasis on tactics of transparency, truth-telling, and exposure?

To dig at these questions, I wish to avoid some of the answers the public consciousness usually points to. By their omission, I do not wish to say that they are not part of the answer. For example, in recent decades significant investigation has been made into management culture and the role of ever-popular voluntary corporate social responsibility in deflecting actual corporate accountability in the justice system. Certainly, corporate culture and Chiquita's CSR will have played a role in managing the public perception crisis of its crimes in Colombia (and elsewhere), though I will not focus here on how. More recently, and less present in the public awareness, is the paradox investigated by Grietje Baars (2016, 2017, 2019) in which corporate accountability has often served to reproduce corporate power, despite its goal to dismantle it.

This investigation aims to understand how and to what extent the corporate accountability regime applied to Chiquita's crimes, while flaunting the promise of demythologizing business and conflict, has also contributed to a troubling mythologization, in which corporate violence cannot be talked about or even understood, other than to determine it as fact.

The investigation's title, "It doesn't hit the scorecard," is a direct quote from Robert Kistinger, former President of Chiquita Brand's International, when pressed by the U.S Securities and Exchange Commission about the executive decision-making process for budgeting payment increases to armed groups in Colombia. While Kistinger meant that pulling out of Colombia over "insignificant" sums of money paid to armed groups was "unrealistic," the title also speaks to my interest in the legal and financial "scorekeeping" of accountability.

Image 1: Doesn't Hit the Scorecard[10]


And considering we're talking about a 75 to a 100-million-budget, nobody is going to worry about something being off by 25 or $50,000 in the relative scheme of, you know, a guerrilla payment. Relatively speaking, I'm sorry, it doesn't hit the scorecard.
Q. No. But I mean in the relative scheme of how important this is.
A. Of 25 or 50,000 to a 100-million-dollar operation, it doesn't.

Thesis Structure

To address the questions outlined in the previous section, this thesis is structured as follows. Chapter 1 (coupled with Interlude 1) examines (and destabilizes) some prevailing categories and representations of the corporate form, looking also to their relationship to law. I rely heavily on Grietje Baars' genealogy of the legal corporate form and corporate accountability to introduce the representational effects, in the political realm, of a legal corporate entity that developed contradictory personhood in private and public areas of the law. To explore the crisis management effects of such a "representational crisis," I examine a recent example in Chiquita's own Special Litigation Report (2009) accounting for its crimes in Colombia, as well as

[10] National Security Archive. 2017, "The New Chiquita Papers: Secret Testimony and Internal Records Identify Banana Executives who Bankrolled Terror in Colombia." April 24, 2017. "The New Chiquita Papers" https://nsarchive.gwu.edu/briefing-book/colombia-chiquita-papers/2017-04-24/new-chiquita-papers-secret-testimony-internal-records-identify-banana-executives-who-bankrolled

Colombian state archives referencing United Fruit that shed light on the power-producing effects of ostensibly, but not truly, divided public and private realms.

Chapter 2 maps the ongoing impunity of Chiquita Brands' for its crimes in Colombia, examining civil and criminal accountability efforts in the United States, Colombia, and at the International Criminal Court. On its face, Chapter 2 seeks to answer, "How many times can we try and get Chiquita [in the justice system] and fail?" while also inquiring how the destabilized concepts of Chapter 1 can shed light on what aspects of the form of law and the corporation continually resurface as ghosts "haunting" the ability of promised corporate accountability to be realized in the present. Since the majority of case law on Chiquita's crimes comes from U.S civil jurisdiction, special attention is paid to the Alien Tort Statute. Primary sources examined in this chapter include U.S court documents and correspondence and interviews with U.S and Colombian-based attorneys.

Having contextualized what the law and corporation *are* and examined Chiquita's passage through various justice systems, Chapter 3 takes a different tack in which I question how fact does or does not bleed into public consciousness in spite of its revelation or transparency. I investigate the ways in which documents, and the government institutions that use, interpret, reveal, and conceal them—in this case the U.S Department of Justice (DOJ) and Security and Exchange Commission (SEC)—fragment and deploy truth and secrets. In this chapter, I am focused on the "Chiquita Papers," company documents obtained by the National Security Archive at George Washington University via Freedom of Information Act (FOIA) requests and litigation against the DOJ and SEC. As in previous chapters, my focus is on the form and not content of these documents, on the way they move and change hands, and what political possibilities may be available to social movements in a politics of "revelation of skilled concealment," or a parallel focus *beyond* the justice systems on "secondary" bureaucracies, such as the SEC, that have taken on greater power in the neoliberal order under the figures of compliance officer and auditors.

1: Structures of Irresponsibility: Political Conditions of the Corporate Form Under the Law

1A. A Reified Corporation Emptied of People

"The political imaginary...is a condition of possibility of legal and economic imaginaries that have obscured the primacy of the political."

(Veldman *et al* 2013: 606)

In order to contemplate what the promise of corporate accountability is (in the case of Chiquita Brand's criminality and others), it is vital to first have a concept of what the corporation and the law *are*, separately and in relation to one another. "Corporate accountability," from the contextualist vantage point of cultural studies, cannot be understood as a freestanding object of study, but rather as the result of historical processes and relations. Doing so helps to lay bare the historical contradictions present in the field today and ensures the proverbial 'forest not be lost for the trees.' This section therefore focuses on the myths embedded in the corporate form and the law as they developed structurally in order to revisit their crisis management 'capabilities' in subsequent chapters.

As early as the 13th century, the potential societal problems presented by the corporate form were acknowledged in Europe. For five centuries the corporate form was therefore managed and restricted by the sovereign control of monarchies (Veldman *et al* 2013: 607). The creation of the market and the emergence of the commodity form in the 16th century necessitated the replacement of natural ownership (the privilege and duty system of feudalism) by *legal* ownership. The concept of the legal personality of people was invented at this juncture, imagining individuals for the first time as subjects of the law. The development of law in the West has a dialectical relationship to the evolution of a commodity-based economy. Through it, people became abstract subjects, "human relations become legal relations" (including relationships of responsibility), and "all property [was] transformed into moveable property," a change that would have bearing on the evolution of the corporate form, as well (Baars 2017: 19).

From its inception, the law developed and held sway in Europe and internationally only where commodity exchange was anticipated. Whereas we commonly envision the law having originated from the state system, some scholars tell a different story: the law developed in lockstep with the development of commercial relations, even before the development of statehood in many cases (Pashukanis 2005, Baars 2017: 22-23).

That the form and substance of law is determined by the mode of production (the superstructure as theorized by Marx) does not mean that the shape and responsibilities ascribed to the corporation (what Baars call the Anglo-Saxon corporate form, which I will highlight below) under the law were inevitable; the *legal conceptualization* of the corporation was disputed territory that developed, solidified, and eventually became normalized through historical struggles that have been studied very little. This is important because neither international law (IL) or (especially) corporate law have been widely studied from a historical or decolonial lens; furthermore—and, relatedly—if there is vast jurisprudence on corporate personality, it subscribes to positivistic acceptance of the Anglo-Saxon legal form of the corporation with little interest in how it came to be, as do plenty of social scientists concerned with corporate crime, corporate social responsibility, and business and conflict. "Critical legal scholars are generally silent on company law" (not to mention practitioners of corporate law) (Baars 2017: 44), which is why a 'historical turn' is needed to consider what mythologizing effects such a silenced history has on the present legal landscape and more broadly, the political possibilities of corporate accountability around the world.

Pre-capitalism iterations of the company were varied, including partnership and company charters controlled by sovereigns. Both legal forms facilitated the generation of profit but, in a fundamental difference to modern corporations, did not separate company assets from those who owned or invested in it. In other words, early investors enjoyed the rewards of joint economic enterprise, but were not shielded from its risks (Veldman *et al* 2013). Under this form of *unlimited* liability, partnerships and company charters were viewed, legally, economically, and politically, as collections of individuals, rather than as entities in their own right.

Colonialist geopolitical ambitions began to change this structure, gradually morphing the corporate form into our current inheritance. Despite cautious beginnings and concerns about the wealth concentration powers of the corporate form, the "reins" previously managed by monarchies began to relax in the 18th century (Veldman *et al* 2013). The Anglo-Saxon corporation is defined by four characteristics: separate legal personality, limited liability, indefinite lifespan, and the profit mandate (Baars 2016). Historians of the corporation largely agree that this process culminated in the 19th century with the invention of limited liability (Veldman *et al* 2013: 607), a revolutionary change with far reaching consequences, as we will explore in further detail. Limited liability is a legal structure in which corporate loss cannot exceed the amount invested in it by shareholders. Legally, limited liability divides company owners from its assets, thus shielding them from risk. The historical processes that led to this conjuncture are, however, contested. "[…]How did limited liability come to be? What were the justifications?" (608).

Both Baars and Veldman suggest that, beginning in the mid-16th century, joint stock companies (JSC) began to facilitate this transition. Joint stocks were contractual relationships between the elite, allowing a degree of removal from a risky venture and shared assumption of risk. The JSC allowed European aristocracy to be "spared the indignity of being seen to engage in business, especially so when businesses failed" (Baars 2017: 57). This form, in addition to the advent of double-entry accounting, was the formula that facilitated early merchant colonialism. "Weber notes, because of the risk of pirate attacks, single ships (each organised as a single venture in accounting terms) normally joined together in a 'caravan'" (Baars 2017: 58). The JSC then, while pre-dating legal "incorporation" and "separate legal personality" for business, is an early vehicle for the development of their *raison d'etre*. In it, we can see a trend that will continue in which elites hone beneficial structures for their business interests through contracts, which trickle into governance and culture over time. Significantly, other ideas in the culture facilitate or are used for societal acceptance of such ideas. For example, the 'idea of the church as the mystical body of Christ…did much towards fashioning for us the anthropomorphic picture of the many members of one body" (Pollock in Baars 2017: 48) that comes to be applied to the Anglo-Saxon corporation. With the JSC, the economic imaginary of a corporate form that is seen as an entity in its own right, separate from the individuals forming it, begins to take shape.

The first multinational JSCs were awarded monopolies and trading privileges by European royalty in exchange for the promise of raising military funds through their spoils. Baars calls this "early synergy" between royalty and early corporations the "military-mercantilist" complex, a blueprint for colonialism (2017).[11] It is worth stressing the shared comeuppance of the law and capitalism and the evolution of a corporate form through colonialism (again, in some cases even before or in parallel to the development of nation states). I mentioned that the JSC accompanied the transition from feudalism to capitalism in order to protect the elite from the risk-laden realities of overseas trade. The early JSCs grew into the infamous royal charter multinationals; the British East India Company was "the first to combine incorporation, overseas trade and joint stock *raised from the general public*" (Baars 2017: 59, emphasis my own). Opening up a share market to the public changed a great deal politically, and eventually legally. With it, royal multinationals became less dependent on royal charters, and the corporate form consolidated as did its political might. "As the Crown came to depend on these companies for loans, their power grew. By 1714, 39% of the public debt was owed to the *three* 'moneyed companies'" (Baars 2017: 60). Societal rejection of monarchical absolutism perhaps explains why a capitalist culture emerged, with the public willing to shoulder this risk as shareholders. However, as Baars points out, a literal 'buy in' to capitalism by popular classes in Europe also meant that the majority of risk of capitalist enterprise became socialized (and abstracted) at this point in history.

The first stock market bubble crashes in England, caused by chartered joint stock companies, took place shortly thereafter. The South Sea Company, for example, having previously restructured the British Crown's debt (and therefore externalized it to shareholders), was not held accountable in the aftermath of a corrupt bonanza that angered the public. In response, the king awarded honors to the company's directors, and "a sum of 2 million pounds was made available for [their] compensation" (Baars 2017: 62). Several members of parliament were expelled from government and a single company director was found guilty of corruption. As the management of this bubble crisis demonstrates, "Then (as indeed now) a separation between high public life and the world of business suited the ruling elite and enabled it to create an ideological

[11] The persistence of these relationships to the present day is important to highlight. Chapter 3, in part, examines our common assumptions about government-corporate relations through the lens of Chiquita's crimes, which could be seen as part of a (para)military-mercantilist complex.

separation/distance between themselves and the exploitative goings-on that supplied their income." (Baars 2017: 64). The resulting Bubble Act of 1720 did not "impede economic development nor the development of company law" but instead led to its being tailored (63). Corporate governance (boards of trustees and directors) was henceforth structured and, with the help of lawyers, limited liability, not yet prescribed by law, was still achieved through "ingenuous drafting" of contracts (Baars 2017: 63). This dual consequence—in which an accountability mechanism (corporate governance) quells public unrest at the same time convoluted structural technologies advance corporate irresponsibility—feels prescient today. If limited liability was not yet a legal norm, it was practiced through ad hoc lawyering in response to the interests of the governing and business classes.

While the burst bubbles of the early 1700s demonstrated the risks society had taken on as shareholders, this model (again, as of yet only existent through ad hoc lawyering) nonetheless persisted due to the maturity of the reification of money capital, what Marx described as taking place when a social relationship (here, symbolized by shares) takes on "a fictitious life and independent existence" (Baars 2017: 67). That is to say, a secondary market now existed for the trading of shares, which became 'realty' in their own right. "Companies [not people] owned the industrial capital and shareholders the 'fictitious' share capital which they could sell at will without affecting the size of the industrial capital" (Baars 2017: 68). This change is not to be underestimated. As Veldman and Wilmott put it, shareholders at this point in history owned mere "coupons" [not assets] whose value was based on "imponderables such as investment sentiment" (Veldman *et al* 2013: 610). In other words, following the reification of money capital, shareholders came to "own" the company in the political imaginary alone, while actually having no relationship to company assets.

Societal buy-in to capitalism accelerated in the 1800s, in part because of railway companies and the need to raise large amounts of capital, spurring several shifts; the legal structuring of the profit mandate and the need to change the definition of the company from "persons form[ing] themselves into an incorporated company" in 1856 (in England), to "persons form[ing] an incorporated company" in 1862 (Baars 2017: 67). This seemingly minor change in language is actually quite a significant reflection of the shift happening both ideologically and structurally: if

it is humans that have agency in the first phrase, in the second it is the company. *The right to incorporate* with statutory protections, as opposed to the "the *privilege* of incorporation by Royal or Statutory grant," (Farrar in Baars 2017: 64) is the end result. By the 1850s, limited liability was introduced into British law through the Limited Liability Act (1855) and similar statutes in the United States and France (Baars 2017: 67). In so doing, the modern corporation—the embodiment of a historical process of the commodification of social relations through law—was born.

Adam Winkler's research into the emergence of corporate 'civil rights' in the United States uncovered a similar tale of the scope of disingenuous and creative collusion between the business class, lawyers, and government officials (what Baars calls the Global Capitalist Class or GCC). At least thirty years after limited liability was won, the question of corporate personhood was raised in United States courts in the 1880s (Winkler 2018). Largely funded by railway robber barons, lawsuits were brought to settle whether a corporation should be seen as a 'person' afforded rights under the fourteenth amendment, meant to protect freed slaves and award equal protection to all persons under the constitution. Southern Pacific tried twice to settle in court whether the taxation of its railroad property by the government was a matter of discrimination under the fourteenth amendment. The second attempt went all the way to the Supreme Court. Winkler provides an account of the case, which includes the fraud of a former congressman and Southern Pacific defense lawyer and the unethical behavior of a meddling judge "who feared the forces of socialism."[12] Neither court decision, it turns out, addressed the question of whether a corporation was a person, issuing decisions on other grounds.[13] Somehow, however, the record of the case was improperly recorded and the blunder, perhaps intentional, created a legal precedent for the personhood (and rights) of the corporation for years to come. "Between 1868, when the amendment was ratified, and 1912, the Supreme Court would rule on 28 cases

[12] Winkler, Adam "Corporations Are People' Is Built on an Incredible 19th-Century Lie:
How a Farcical Series of Events in the 1880s Produced an Enduring and Controversial Legal Precedent."
https://www.theatlantic.com/business/archive/2018/03/corporations-people-adam-winkler/554852/ (05/03/2018).

[13] For more recent history on the Supreme Court's abnegation of engagement with questions of corporate personhood, see the sections on *Kiobel v. Royal Dutch Petroleum* and *Cardona v. Chiquita Brands Int'l* in Chapter 2.

involving the rights of African Americans and an astonishing 312 cases on the rights of corporations."[14]

There are several aspects of this history that are worth highlighting for the sake of this thesis. First, both Baars and Winkler point out that the power to shape the corporate form was held by "wily legal team[s]" practicing "deceitful legal alchemy,"[15] with the backing of business and, at times, royalty and/or government officials (together forming a global capitalist class). Ideas such as incorporation and limited liability began with inventive contracting but eventually found their way into legislation. In this way, Baars further argues that lawyers "congeal" capitalism for the GCC and structure the illusion of divorced public and private spheres, the consequences of which will be clear as criminal codes developed in the 20th century fail to address corporate subjects (this will be covered in the following section).

Second, and most importantly of all, the above-mentioned process in which separate legal personality, limited liability, profit mandate, and indefinite lifespan develop amount to the "reification" of the corporation:

> *"According to Lukács, reification involves a confusion between the natural world and the social world, where the very people who create and sustain a social construction treat their own product as something fixed and unchanging. In the act of reification, people mistakenly treat a* non-thing, *such as an institution, social role, or relationship, as a* thing, *an immutable part of the natural world. Lukács explains: 'Its basis is that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity,' an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.'"* (Litowitz 1999: 401)

While all four of the characteristics of the Anglo-Saxon corporate form gradually and jointly serve to "entify" (and later, anthropomorphize or personify) it, limited liability is perhaps most responsible for this shift. Once the joint stock company "is constructed within the legal imaginary as a separate legal entity that holds the assets of the corporation" the corporation develops what Veldman and Wilmott call "agential capacity" (2013:608) (the same idea as

[14] Winkler, Adam "Corporations Are People' Is Built on an Incredible 19th-Century Lie:
How a Farcical Series of Events in the 1880s Produced an Enduring and Controversial Legal Precedent."
https://www.theatlantic.com/business/archive/2018/03/corporations-people-adam-winkler/554852/ (05/03/2018).
[15] Ibid.

Lukács' "phantom objectivity"). Legally speaking, the entity, not the managers or shareholders, own company assets, thus, as posited by Ireland, "the company became a singular entity, separate from shareholders, 'emptied of people'" (in Baars 2017: 68). Once the entity was consolidated in the legal realm as a "reified construct" in the 19th century, it would inevitably (or at least, problematically) be attributed "agency, ownership, and rights" and even come to be understood as a "full legal 'subject' or even 'person'" (Veldman *et al* 2013: 608) in the 20th century, as Winkler's example in the United States demonstrates. The correlation that therein develops, in simple terms, means that the *corporate entity* should be penalized for the actions of its members, and that penalties ought "not [be] levied on the assets of investors or managers" (2013: 609), turning the corporate form into, in Baars' terms, "an immoral calculator" (2017) seemingly divorced from the decision-making of its human constituency.

According to Veldman, "almost all of the specific properties that make up the modern corporation would have been unthinkable less than two centuries ago" (2015: 4). Veldman and Willmott (2013) point out that it is unknown why the state granted incorporation and limited liability to the corporate form, in spite of its awesome wealth accumulation abilities, but that it would seem colonialism provided the rationalization. In turn, the risks associated with global colonialist enterprise led to the socialization of said risks through the "democratization" of shareholding in Europe. Furthermore, "the pooling of capital by increasing numbers of shareholders created a growing separation between shareholders and 'the company' […] To accommodate the increasing distance of shareholders from ownership functions, shareholders were separated from the assets, operations, and risks of the corporation by shifting these onto the separate legal entity" (Veldman 2015: 8), leading us gradually to "entification."

Entification brings me to my third point: without it, and without the contractual agency of a separate legal entity, "the capacity for a corporate entity to 'own' another corporate entity'" and "the capacity for groups of entities to operate over jurisdictional borders" was not possible (Veldman 2015: 4, 9). That these legal concepts developed over the course of the 19th century, alongside colonist geopolitical ambitions, is not coincidental. The 'technology' of entification was "highly significant for the development of capitalism because it allowed economic activity to become concentrated...and exert powerful, monopoly-like influence over many areas of

economic activity nationally and, increasingly, globally" (Veldman *et al* 2013: 608-9). Importantly, private and commercial areas of the law, mainly contract law, develop before public law. In this way, budding international law—one of the main tools of the corporate accountability movement today—wholly adopts the reification spread through commerce and contracts, not to mention domestic and international criminal legal codes, which develop largely in the 20th and 21st centuries. According to Veldman and Willmott, contract law "made it almost impossible to conduct business on an international level without acknowledging and accepting the assumptions behind the Anglo-American concept of incorporation" and "we consider the contemporary concept of 'incorporation' to be internationally accepted— that is to say, a specific form of incorporation, characterized as the modern western limited liability share corporation, which emerged principally from Anglo-American legal and economic origins in the 19th and 20th century" (2013: 606).

Fourth, while it is the state that ultimately universalizes and consecrates these concepts under law, we should not lose from sight that the concepts themselves come from a rentier or global capitalist class in response to commercial interests. Depending on the region, this class, armed with contracts, influences state formation, and the subsequent development of public interest law.

Nearly all practitioners of any area of the law as well as contemporary corporate accountability activists have long forgotten that "reification"—the process by which individuals affected by a corporation's (material) acts are forced to be in *relationship* with the (immaterial and personless) corporation, instead of the individuals comprising it—is a normalized but hardly inevitable legal contradiction. This means that the political possibilities of the corporate form are largely hamstrung by a problem of *representation* in the economic and legal realms.

1B. A Crisis of Representation

To examine this representation problem and couch it in Chiquita's case specifically, I turn now to the Special Litigation Committee (SLC) Report,[16] funded by Chiquita Brands and submitted to

[16] 2009. *"The Special Litigation Committee of Chiquita Brands International, Inc.'s Notice of Filing Joint Declaration of Howard W. Barker, Jr., William H. Camp and Dr. Clare Hasler.*" Filed before United States District

United States District Court in the Southern District of Florida in response to a complaint brought by its own shareholders following the Department of Justice (DOJ) investigation into Chiquita's payments to the United Self Defense Forces of Colombia (AUC), which resulted in the company's 2007 guilty plea. The SLC was composed of three "independent"[17] individuals tasked with deciding "if there is any basis to hold the individual defendants [company managers] civilly liable for their actions as a result of a breach of duty to the Company and its shareholders" (SLC 2009: 21). In other words, following the company's admission of guilt, according to the SLC's opinion, was there validity to several shareholders' claim that Chiquita management had "breached their duties of care of loyalty to the company" as outlined in corporate law (SLC 2009:10)? Should Chiquita "pursu[e], dismis[s], or otherwise resolv[e]" the shareholders' complaint, using company funds to take action against its officers or, alternatively, for their defense (SLC 2009:10)? Importantly, the decision as to whether company executives had breached their duties to the company—primarily in a fiduciary sense, as opposed to criminal—was a matter for the Southern District of Florida to decide. The SLC report is a brief submitted to the Court on behalf of the company. It is of interest to my question of representation because of the ways in which the SLC—coming from the perspective of corporate law, fiduciary responsibility (ie. profit mandate), and the economic imaginary—tip toe around the ever-slippery relationship between Chiquita the entity and Chiquita's officers. In other words, to extrapolate Stuart Hall's concept on race, whether or not the corporation is a collection of individuals or an individual in its own right is a matter of "floating signifiers"[18] that are employed in interesting (and even contradictory) ways.

The three-hundred-page report, while purportedly interested in the decision-making of Chiquita executives relative to payments made to illegal armed groups in Colombia's armed conflict, is rife with language reflective of an entified Chiquita Brands. For example, the SLC ascertains

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Court in the Southern District of Florida. Available at: https://nsarchive2.gwu.edu/NSAEBB/NSAEBB340/chiquita-slc-report.pdf (10/11/2020).

[17] Each of the authors of the report (an accountant specializing in corporate governance and SEC reporting, an investor from the agricultural commodity sector and, most interestingly, a Quaker dual PhD in Environmental Toxicology and Nutrition) have since served many years on the board of Chiquita Brands. Both their subsequent board memberships and lack of legal expertise raise questions as to their aptitude for discerning civil liability.

[18] Hall, Stuart. 1996. "Race: the Floating Signifier." Goldsmiths' College, New Cross, London. Conference remarks available at: https://digitalassets.lib.berkeley.edu/mrc/ucb/video/hallracesignifier62.mp4 (Consulted on 09/05/2019).

whether *Chiquita itself* had "practiced business judgment," failed to act in its self- interest (as a company) or—in particularly noteworthy discursive gymnastics—whether or not Chiquita had been "caused to make payments" to the AUC "consciously" or in "bad faith." Given that the company had admitted to the payments, the SLC is interested, therefore, in the intentions with which it was *made* to do so by its human counterparts. The answer to this question, of course, has tremendous social reach and significance. In the same vein, the SLC report questions the *company's* "corporate integrity," as well as its "awareness" or "consciousness" of the actions of its representatives, and "strong feelings" on government policy. In other words, Chiquita the entity is often personified (reified) as a sentient and moral being, while simultaneously dehumanizing (or at least infantilizing) its officers, whose actions are hidden in a discursive labyrinth of inactive verbs.

1C. "Collateral Issues"

Of course, the SLC's emphasis on Chiquita the entity to get at questions of officer responsibility is not illogical from the perspective of the economic imaginary, which it explains in detail.

> *"Under New Jersey law*[19]*...the decision to authorize, or allow, the payments is protected by the business judgment rule, a judicial presumption that the defendants acted with the duty to care—that is, 'on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.'...in order to rebut this presumption, it must be shown that the defendants acted with fraud, illegality, a conflict of interest, gross negligence, or without a rational business purpose."* (SLC 2009: 11).

In the business judgment rule (corporate law) the "amoral calculator" theorized by Baars is obvious. To dispel the protection of the presumption of the business judgment rule, a breach of various management duties must be proven. Yet such breaches are bizarrely defined. A breach of the Chiquita managers' fiduciary duty would mean making payments to the AUC while *being aware* that the group was on a U.S State Department list of terrorist organizations (after 2001). As such (according to the SLC), payments made before the terrorist designation, or made after the designation but with the documented ignorance of management of the designation, are protected by the business judgment rule. A breach of the managers' duty of loyalty is constituted by a failure of oversight which "occurs when 'either (1) the directors **knew**, or (2) **should have**

[19] Even though Chiquita Brands headquarters during the years it made payments to the FARC and AUC was in Cincinnati, Ohio, the company was incorporated (and thus subject to state law) in New Jersey. Many U.S companies incorporate in Delaware and New Jersey due to their famously business-friendly laws.

known that violations of the law were occurring *and*, in either event, (3) that the directors took **no steps in a good faith effort** to prevent or remedy that situation, *and* (4) that such failure proximately resulted in the **losses** complained of [by shareholders]'" (SLC 2009: 13, bold emphasis my own). The business judgment exclusion only applies if a "knowing violation of the law" occurs (SLC 2009: 18). Under this logic, *un*knowing violations of the law, made in good faith (ie. ignorantly) and *un*consciously, without causing losses to shareholders are in fact protected under the law. This is what the SLC, and Chiquita have argued: the directors were unaware of the AUC designation on the U.S foreign terrorist organization (FTO) list for a number of years; while directors admittedly should have known about the designation,[20] this fact is secondary to their "good faith efforts" to track and report company payments to the Convivirs (an intermediary that funneled the payments to the AUC), which were also disclosed to the U.S Securities and Exchange Commission; furthermore, the payments were made in good faith to protect company personnel; finally, the payments, while exposing the company to legal fees (ie. the DOJ fine) and losses to its reputation (to the disadvantage of shareholders), were indeed financially reasonable because they allowed Chiquita to continue operating some of its most profitable farms in Colombia. Thus, "...the SLC concluded that, in allowing the payments to be made, the directors acted in good faith, and to advance the best interest of the Company" (SLC 2009: 20).

By the SLC's estimation (and ostensibly, Chiquita's), the company's payments to armed groups in Colombia were only problematic because, in a somewhat expected consequence of the September 11th attacks on the World Trade Center, the AUC was added to the State Department's Foreign Terrorist List (FTO): "In the absence of the FTO designation, the decision to make the payments, as analyzed above, would, *under appropriate circumstances*,[21] be

[20] The question of the managers' knowledge of the payments is very nuanced. While it is uncontested that the managers *did* know it was making several payments to an FTO at some point prior to January 2004, and certainly during the Department of Justice investigation (and it was for these payments that it was eventually fined), the managers contest that they were unaware of the FTO designation during several years in which the payments were made. The DOJ was not concerned with the payments it had made to the AUC dating back to 1997, before the armed group was labeled a terrorist organization by the U.S government, nor did it fine Chiquita for payments made after the 2001 FTO designation but *before* the company became aware of it (according to its internal documentation). There are numerous reasons to doubt the plausibility that Chiquita was unaware of the FTO designation; my point here is that the question of knowing or not knowing is a.) easily manipulated by internal reporting and b). problematically linked to the establishment of officer liability.

[21] Under New Jersey corporate law, the duty to monitor far outweighs the duty of oversight: "Only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable

protected by the business judgment rule" (SLC 2009: 240, emphasis my own). Furthermore, rather than the obvious—that thousands of Colombians were harmed or killed by Chiquita's financing of armed groups in Colombia—the SLC asserts that it was "Chiquita [that] had suffered significant harm as a result of the payments that were made in Colombia after the AUC was designated as an FTO" (SLC 2009: 23).

What I wish to highlight with these examples is the way the corporate entity is evoked. If the company is anthropomorphized with qualities like integrity and 'victimized' by government policy, the officers are much more one dimensional. In fact, their primary role is to enact business judgment on behalf of the company, which as we have seen is unanalogous to any moral or social considerations. In fact, legal considerations seem to have considerable wiggle room, so long as the immoral calculator (Anglo-Saxon corporate form) is left to operate as designed, and proper corporate reporting ("under appropriate circumstances") can keep government or societal concerns in check. Meanwhile, one of the core reasons the corporation is justified to function as a separate legal entity is to isolate shareholders from the financial risks of its operations. While their shares can be adversely affected by public sentiment towards Chiquita and its reputation, neither shareholders nor officers were at all affected by the DOJ fine of $25 million dollars (in any event, a small fee for a corporation like Chiquita). The outright dismissal by the SLC of the shareholder complaint on the grounds of supposedly sound business judgment is a clear indicator of this separation as well.

Interestingly, the idea that there is separation between the officers and the entity collapses in the section of the SLC report that describes lengthy negotiations[22] between the Chiquita managers and the DOJ on Chiquita's eventual plea deal, in no small part because the full entification within the realm of private corporate law does not function the same way in criminal law. The shareholder complaint included a claim that the officers had agreed to the plea deal (company fine) in order to avoid the criminal prosecution of individual officers. Between Chiquita and the

information and reporting system exists—will establish the lack of good faith that is necessary condition to liability" (SLC 2009: 20). In Chiquita's case, it tracked and reported its payments to Colombian armed groups to the U.S government. The idea is essentially that managements' failure to know about irresponsible behavior is dispelled by the existence of a proper reporting system. The role of auditing and "transparency" will be explored in Chapter 3.

[22] Some details of this negotiation will be touched on again in Chapter 3.

DOJ "The primary issues to be negotiated were (i) the specific statute to which the Company would agree to plead guilty, (ii) the amount of the fine that would be assessed on the Company, and (iii) whether individual officers or directors would be prosecuted" (SLC 2009: 179). In response to the shareholder complaint:

> *"The SLC examined this issue and found that while the Board initially sought to avoid the prosecution of individual officers and directors, its motivation for doing so was not self interest. Rather, the Board believed that such prosecutions would be harmful to the Company because: the Company would have to pay substantial legal fees for the continued investigation and possible prosecution of those individuals, the Company's reputation would be damaged further as a result of ongoing legal proceedings against any of the individuals, the indicted individuals would be unable to perform their duties for the Company, and individual prosecutions could put certain of the Company's credit facilities in jeopardy"* (SLC 2009: 226).

Here, when it comes to the individual guilt of Chiquita officers, the SLC, rather than accentuate the separate personalities of an entified Chiquita and its officers, actually conflates them. Of course, every true rule has its exception. The previously upheld fabrication that the personal interest of officers and company interests are not the same falls apart in this passage. More still in the declaration that "The Company fought to keep '*collateral issues*,' such as issues relating to the Company's books and records, out of the information and to prevent the government from *identifying individuals by name and position*" (SLC 2009: 184, emphasis my own). In these examples a pattern is clear: entification is either evoked to promote corporate personhood (for the sake of extorting entity rights) or downplayed to shirk either the responsibility of officers or entity, sometimes in contradictory ways, depending on the situation.

1D. Equal Rights to Inequality

Section 1A of this chapter explained how the corporate form evolved, became reified and emptied of people, and thereafter created a crisis of slippery representation of the corporate form and its human counterparts. Section 1B explored the way in which the Special Litigation Committee employed slippery signification in contradictory ways to justify both Chiquita's operation as an amoral calculator and, in 1C, the "collateral issue" of agential decision making by its human counterparts. The SLC report, however, does not reflect the state's view (through the application of law) on this representational crisis. The following section aims to provide a non-exhaustive theoretical framework for understanding how such "slipperiness" has been

managed historically by the state in different and relevant legal jurisdictions, and to what effect. Since the legal framework of corporate accountability lies "at the intersections of tort law, human rights law, and criminal law" (Comaroff 2016: 27), I have paid attention to critical legal scholarship on the corporate form in all these areas of law, while recognizing that I do not yet (or perhaps cannot) have a grasp on the full scope of relative debates within each of these fields.[23] What I am interested in delineating is the historic irresolution of the corporate crisis of representation in various areas of the law that specifically come to bear on Chiquita's own journey through the judicial system for its crimes in Colombia (see Chapter 2). My hope is that such an exercise will prove fruitful both for chipping away at the positivism of current corporate accountability practice, lay bare the historic nature of contradictions in the law that continue to haunt corporate accountability today, and to upset the assumption that corporate accountability strictly *progresses*, rather than recycles, redistributes, and reenlists past disputes in new ways. Toward this end, I am guilty of focusing specifically on legal scholars who are willing to question whether the form of law, not just its contents, is part of the problem.

In broad strokes, the history of the irresolution of the corporate representational crisis can be said to have three historical moments following the solidification of the Anglo-Saxon corporation. The first has to do with the spread of international law and colonization, the second with international criminal law and liberalism, and the third with human rights and neoliberalism. Baars' main thesis is that the "capitalising mission" of international law was rebranded as the "civilizing mission" of liberalism, again rebranded as a "development mission" under international criminal law (ICL) and transitional justice, "while forever remaining truly a 'capitalising mission'" (Baars 2017: 99) that refuses to contend with corporate reification. The pairing of an ideological-cultural-political focus with the rise and development of a specific form of law during three distinct historical moments is, in my opinion, essential to any approach made in cultural studies to the law, the subjectivity of the corporation, and its continued impunity.

[23] Legal practitioners of corporate accountability are necessarily interdisciplinary because of the challenge presented by the unparalleled reach and global movement of the corporate form. The confusing, nuanced way in which these areas of the law overlap or contradict presents a challenge for understanding the myriad ways in which corporations dodge accountability in different forums. That said, this issue is generally addressed by comparative legal scholars, who do not take into account issues of representation, law as form, or the history of the Anglo-Saxon corporate form in their diagnoses.

For Baars, the early development of law generally and international law especially had more to do with delineating the property rights of a global capitalist class than with state polities. In fact, early conceptions of the legal system did not include "divisions between the domestic and the 'international' but instead one legal space organised according to the logic of commerce" (Baars 2017: 86). International law, states, and the corporation 'grew up' together: "[...] It was only with the rise of sovereign states that international law can be considered to have been born, and it is with the triumph of capitalism and its commodification of all social relations that the legal form universalised and became modern international law" (Mieville in Baars 2017: 81).

After commercial routes were hewn internationally and the military-mercantilist class gained power (while helping to transform absolute monarchical rule), international law developed. "Succinctly, international law is colonialism" (Baars 2017: 82), following the trade routes of the GCC. However, "colonialism is in the very form, the structure of international law itself, predicated on global trade between inherently unequal polities" (Mieville in Baars 2017: 82). Colonial powers thus offer formal legal equality under IL to 'sovereign' states—often in exchange for commercial advantage negotiated with the elite of colonized lands—thus masking material inequality under a *nominally* equal system.

In Baars account, international law develops 'private' and 'public' realms from the get-go. The former, concerned with property rights, corporate law, free trade, and profit, was largely developed and internationalized through the royal charter companies of the modern world. According to Baars, the state steps in politically with manifest 'public' IL (with a Christian-rule emphasis on order, proper governance, humanitarianism, and the promise to check colonial plunder) once a territory has already developed capitalist market relations. This terrain, of course, is laid by the corporate form. This process could take place directly between a European and colonized capitalist class, or through the access granted a corporation that bought and refinanced the sovereign debt of a colonized government. "[...] Sovereignty is recognised by the metropole/GCC [global capitalist class] conditional upon (amongst others) continued free access to markets and natural resources" (Baars 2017: 102). Of course, "the opportunity to gain statehood presents the 'equal opportunity to be unequal'" (102) as the law enshrines a formal equality among actors after the securing of inequality through the force of colonization.

For Baars, the separation between the "economic and political realms in IL" creates a heuristic challenge that naturalizes the primacy of the economic realm; "...because the discourse of 'responsibility' belongs to the 'constitutional'/'political' part of international law, and corporate activity in the 'private', an ideological hurdle must be overcome before one is associated with the other" (Baars 2017: 101). Of course, it is not just an imbalance of the codification of responsibility between these realms, but the differing subjectivity of the corporate form that has occulting power.

This division between the public and private realms in international law cannot be stressed enough. Over subsequent years, the corporation develops more codified international legal personality in private IL through mechanisms that matured in ways with which the public is today somewhat familiar; for example, through the development of bilateral treaties with carefully crafted investment protections and arbitration clauses that can make a state liable for the economic losses of foreign investors. Importantly, the international legal personality of the corporation does not similarly extend into public IL, the consequences of which lead us to the 20th century, and our second historically significant moment.

In the early 20th century, national movements for sovereignty and self-determination necessitated that IL receive a makeover of sorts. Pure colonization was no longer couth (United Fruit's infamy in Colombia and other Latin American countries during these years is, of course, a prime example of such conflicts), yet trade was seen as the main tool—both for the colonizers and the colonized—to secure social advancement and progress. Yet the heuristic separation between the economic and political areas of IL continued; liberalism sequestered the economy from the rights system, painting issues of sovereignty and self-determination as violent, "third world" politics, while emphasizing social citizenship rights, humanitarian values, and the "peaceful" nature of a world community (fashioned after and to the benefit of the North & West), tied by mutual commercial need (on unequal footing), and voluntary (yet unequal) exchange.[24] In essence, the promise was to globalize the welfare state, without addressing why

[24] Whyte, Jessica. 20 November 2018. "*The Morals of the Market: Human Rights and the Rise of Neoliberalism*." Department of Development Studies, SOAS University of London. Conference remarks available at: https://www.youtube.com/watch?v=7Luol5YNt9k (Consulted: 10/04/2019)

much of the world did not have the resources to do so. Political independence under liberalism was secondary to the integration of colonial states in the world market, a trend contested by organized banana workers in Colombia in the 1920's and others fighting for socialism, communism, or other forms of distributional equality who, not surprisingly, also challenged the irresolution of corporate personality in IL.

A major inflection point for potentially contending with this heuristic challenge and the contradictory development of IL came with the Holocaust. In recent years, there has been newfound interest in the study of the treatment of industrial financiers of the Nazi regime at the Nuremberg tribunals, particularly by participants in the corporate accountability movement. While some believe international criminal law (ICL) was seeded earlier, this young branch of the law is most commonly traced to the Allies' trials (with different aspects of them spearheaded by different countries) of Nazi war criminals.[25] Several large legal questions loomed at Nuremberg. Principle among them was a desire to establish individual criminal responsibility—in keeping with a liberal focus on the individual—for breaches of international law, even when state (Nazi) law permitted it. The second large question was the "economic case" or how the economic financiers of the war would be handled. The latter question was tried by the United States in a military tribunal. Initially in favor of a short trial of the economic case, Baars recounts a history in which a changing political climate—namely, the anti-communist Truman Doctrine—shifted US interests at Nuremberg from providing an economic trial for the public interest, to rebuilding the German economy. As Baars tells it, the US leadership of the economic case devolved into theater of the absurd in which, ultimately, "the Tribunals' task was to distinguish culpable involvement with an evil regime from innocent 'business'" (Baars 2017: 144). While many of the lead attorneys on the case had developed an approach that would show that industrialists were the "third pillar" of the war (advocating for *corporate* liability, though IL was unclear on this point), ultimately a small group of individual industrialists were tried under an individual liability framework. "An overall result of the chosen approach is that the prosecution of designated individuals left the 'structure' or system untouched, and as such facilitated the US objective of rebuilding the corporations as part of the economy" (Baars 2017: 148). As in

[25] This branch of the law was essentially paralyzed during the Cold War, resurging in 1998 with the Rome Statute and becoming institutionalized under the 2002 founding of the International Criminal Court in the Hague (Baars 2017).

Germany, a similar "economic case" was (crisis) managed by the US at the Tokyo Tribunals so as to "give the semblance of accountability of the authors of the war, while in fact ensuring that host elites considered responsible at the outset, turned from adversaries to allies" (Baars 2017: 209). In so doing, "the US transformed controlled, monopolised closed markets into an open Europe and Japan where US companies would find plenty of investment opportunity as well as markets[...]" (Baars 2017: 210). As Baars argues, US international policy, reshaping the post-war economy in Europe and east Asia to its benefit, is accomplished through alliances with corporate offenders while also *performing accountability* and moral authority.

Today, lawyers and business and conflict scholars rightly criticize the failure to address the economic causes of conflict sufficiently in ICL during the Nuremberg and Tokyo Trials. The trials failed to create a consensus on whether or not corporate liability exists in ICL, but the potential of this area of the law to many has been to lay bare the actions (or action by omission) of *individuals* involved in complex organizational crime. I mentioned that private-economic IL is historically divorced from the political-public-humanitarian IL which deals with responsibility. While corporate personality was developed and maintained in the former example, it was abandoned in the latter. ICL as a newer, 'less mature' area of international law, is seen therefore, to have more promise for remedying this gap. ICL is an area of the law in which the subjects and objects are still being established, thus the push by the corporate accountability movement to correct the contradictions of IL and define whether the company, as a legal person, can be an international criminal, and if so, its human counterparts can be held liable. The legal and political significance of these debates is not insignificant. "The ideological weight of declaring select crimes the true ills of international society should not be underestimated" (Baars 2017: 224). As we will examine in Chapter 2, this is one of the prosecutorial strategies that has bearing on Chiquita's liability for its crimes in Colombia, though it is not without its challenges, and Baars would argue that it is already a failed strategy out of the gate.

The final moment, our current conjuncture, following the conceptualization of human rights as contract and property rights (colonization) and human rights as social citizenship (liberalism), is

human rights as we view them today (neoliberalism).[26] For Samuel Moyn, the inflection point for this era begins in the 1970's, while Jessica Whyte, based on her research of the Mont Pelerin Society (2018, 2019), traces neoliberal thinking on human rights to the 1930's. Regardless of its exact genesis, both authors concur, and it is clear in Chiquita's own case (see Chapter 2), that the human rights movement (and its corporate accountability counterpart) experienced a boom after the 1970's. But if there is a historic correlation between the rise of human rights and neoliberalism, is there also a relationship of causality between them? Moyns and Whyte investigated this question with overlapping results and disparate conclusions.

Both authors concur that liberalism (in the words of Moyn) "globalized status equality" among nations while leaving the "globalization of material distributive obligation"[27] behind. Both map a historical process of resolute separation between human rights on the one hand, and sovereignty, self-determination, and the "sequestering" (in the words of Whyte) of the economy from the rights system in the liberal order, on the other. Likewise, both concur that the effect of this displacement was to shift any decolonial or economic focus on collective rights to individual rights, and that human rights NGOs (blossoming under the neoliberal global order), at least the largest and most monied of them, facilitated the "pathologization"[28] of populist struggle, while favoring *particular* human rights that could flourish in the "right" capitalist economic-political context. Importantly, collective human rights (in the sense of Marx's "rights of man") to things such as food, housing, and health faded from view while individual rights to freedom and expression took the fore.[29] Finally, both authors note that human rights in its current form is not a project of inalienable political rights, as we commonly believe, but "a constructionist project"[30]

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[26] Moyn, Samuel. 2018. "*Human Rights in the Neoliberal Maelstrom*." Duke University, Durham, North Carolina. Conference remarks available at: https://www.youtube.com/watch?v=rkDzcrzG4TA (Consulted: 10/04/2019).
[27] Ibid.
[28] Whyte, Jessica. 20 November 2018. "*The Morals of the Market: Human Rights and the Rise of Neoliberalism*." Department of Development Studies, SOAS University of London. Conference remarks available at: https://www.youtube.com/watch?v=7Luol5YNt9k (Consulted: 10/04/2019)
[29] Of course, the UN International Covenant on Economic, Social, and Cultural Rights aims to remedy this gap. Nonetheless, the ESCR movement, which has progressed in great part thanks to the leadership of the Global South, is still discussed in nation-state terms, not in terms of redistribution of the global world order scaffolded by IL (Moyn 2018).
[30] Whyte, Jessica. 20 November 2018. "*The Morals of the Market: Human Rights and the Rise of Neoliberalism*." Department of Development Studies, SOAS University of London. Conference remarks available at: https://www.youtube.com/watch?v=7Luol5YNt9k (Consulted: 10/04/2019)

hogtied by the economic-political strictures of the international legal system, including ICL. In the neoliberal era, economic market freedoms are ostensibly *sui generis* to political freedoms, not the other way around (Whyte 2018).

Where these authors diverge is in their diagnosis. For Whyte (also Susan Marks, and more popularly, Naomi Klein) the mutual comeuppance of neoliberalism and human rights is not strictly correlative, while for Moyn, alleging a causal relationship is a step too far; the human rights legal construct does some things very well: "The problem is not that so much attention has been given to human rights, but that so little has been given to their connection to economic distribution."[31] Both lines of thinking are helpful for considering the promise of accountability for corporations, perhaps the most powerful creators of inequitable economic distribution, within human rights frameworks.

So, what corporate accountability strategies exist within these fragmented legal landscapes today? There are various strains with innumerable technical considerations, which Baars outlines in great detail, offering more minute legal analysis than I will engage with here. To summarize, ICL is the premier place of dispute over corporate accountability today, but there is a great deal of conflict over its interpretation, even among proponents of the corporate accountability movement. Disparate interpretations reside in the origin story of ICL (Nuremberg or earlier), with differing jurisprudential effects; on whether "law of nations" considerations in IL, previously applicable to piracy, can be brought to bear (see Chapter 2) on state enforcement of international crimes; whether the lack of consensus on ICL should be remedied by a strategy of institutional enforcement at the International Criminal Court or by further definition of what constitutes international crimes in domestic state legislation; and whether and when international crimes can be committed by abstract entities (with the relationship of the entity to its sum parts being a another debate). Meanwhile, the intersecting perspective of human rights advocates is to raise the profile of tools such as the International Covenant on Economic, Social, and Cultural Rights, the Maastricht Principles, and to push to make the Ruggie Principles on Corporate Responsibility legally binding through a mechanism such as a treaty.

[31] Moyn, Samuel. 2018. "*Human Rights in the Neoliberal Maelstrom*." Duke University, Durham, North Carolina. Conference remarks available at: https://www.youtube.com/watch?v=rkDzcrzG4TA (Consulted: 10/04/2019).

If this panorama seems confusing it's because, in fact, it is. The temptation to get lost in the details is great, and I do not discount the important efforts of those whose work it is to try and bring some structure to situate the corporation in the historic fragmentation and heuristic challenge of divorced private and public spheres.

Nonetheless, taking a bird's eye view on the technical debates at hand, I wish to conclude this chapter with several observations on their sum effect in relation to the historical context provided in this chapter. I have argued that the law is in and of itself violent inasmuch as it developed to secure a particular world order favoring the commercial interests of a (predominantly cis-hetero, white, Western, Northern) global capitalist class; that the reification of the corporate form facilitated a smoke and mirrors relationship between private and public areas of the law; and that moments of inflection in which resulting contradictions were challenged (the 1940s and 1970s) also heralded excited focus on "new" solutions to solve the contradictions of IL (looking to ICL and human rights to do so). From where we stand today, on the tail end of this historically fragmented legal landscape, state-based solutions seem to have taken a backseat to international mechanisms, and we claw to fill the void created by the abandonment of the "economic" in our conception of human rights. Perhaps it is time to revisit how we got here, to an age in which juridical, rather than literal forms of violence increasingly structure and police the world order (Hamzic 2016). Why, then, do we think the law is our way to justice? Walter Benjamin called the law's lure to liberate us from the intrinsic injustice of the law "divine violence." (Hamzic 2016: 82). To eject ourselves from such a teleology, "Is it, then, too preposterous to ask what insights could be obtained if international law is posited no longer as a discipline and practice intrinsically committed to regulation of violence, but as violence itself?" (Hamzic 2016: 79).

The following chapter, "*How many times can we try and get Chiquita and fail?*," will evidence the (in)effectiveness of our corporate accountability strategies thus far. The theoretical framework provided in this chapter is meant to bottleneck the prevailing momentum driving the corporate accountability movement, which is to create new categories and areas of law to resolve a very old contradiction: the divorced private and public spheres of IL and matured corporate entification in private law which struggles to crossover to the public realm of legal responsibility.

Baars, Whyte, and Moyn provide us with important political economy context to allow us to question, or at least problematize, how ICL and human rights law have come to be viewed as the tools for addressing business in conflict, when an alternative view is that "[t]he language of human rights is essential to the oversimplification of the roots of disorder in international society at present (Carty in Baars 2017: 115), and has historically furthered the cleavage of economic rights from the realm of responsibility.

Interlude[32] 1: The Urabá of the early 1900s

Dear Minister of Public Works:

I respectfully request the allocation of 5,000 hectares of public land near the Gulf of Urabá to colonize and found a banana farm. I have secured English capital from a Mr. Nash in New York to aid me in my enterprise. By God's grace, and through the labors of the workforce this enterprise will attract, we will make productive land of this swamp and thus bestow honor upon our nation.

Sincerely,

Vicente Montoya Pinto

I am paraphrasing, of course, but not much; so read dozens of letters within Colombia's national archive on "baldíos" (public lands) from the 1900s and 10s. They are original documents, on paper marred by humidity and bugs, covered in bureaucratic stamps, and rather ineligible in their antiquated cursive. I am allowed to touch them with my bare hands. The archive is entirely unorganized, replies are not matched to petitions and vice versa, in many cases, it is unclear to whom many letters are addressed. I can only assume that requests for such vast acreage were routine. 5,000 for Vicente, 2,000 for Efraín, a couple thousand for a Mr. Nash...

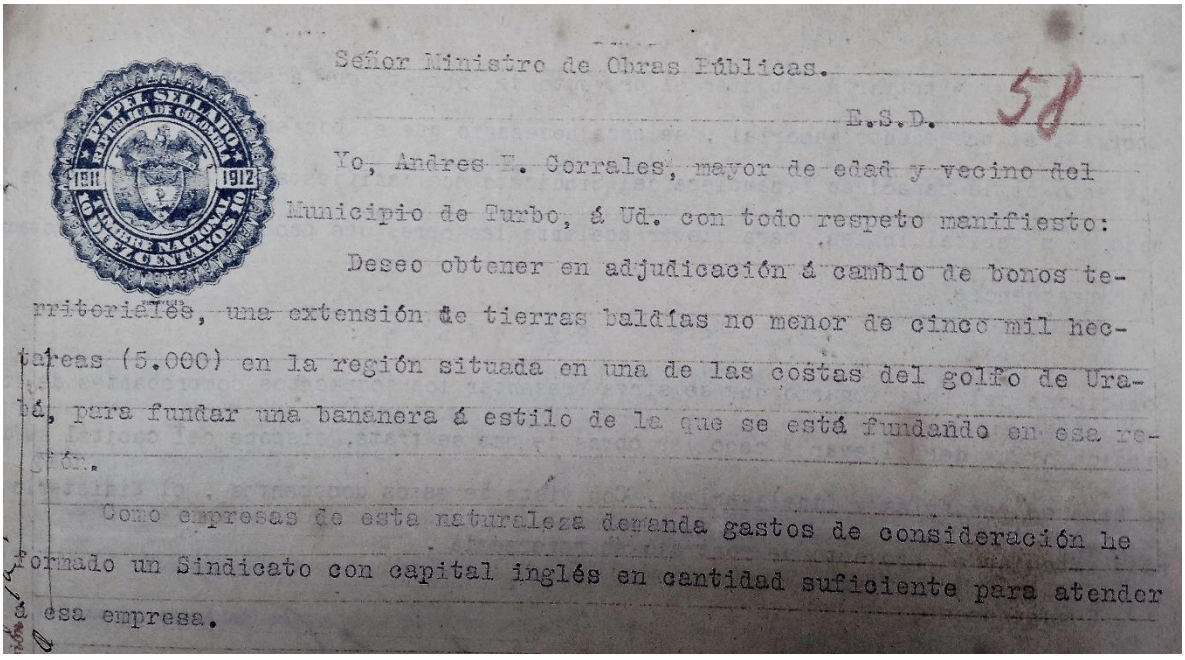
My favorite document[33] in the archive is not dated, though I assume it to be from the early 1900s, in parallel to or just before the flurry of letters of eager colonizers of Urabá. It is called

[32] The "interludes" between chapters of this thesis are included to incorporate my own (less academic) voice and reflections on some of the themes dispersed throughout.

[33] Escobar, Enrique e otro. Unknown date. "*Informe sobre el resultado de una comisión que les fue conferida para visitar las regiones del Golfo de Urabá*." Manuscript. Baldios Archive, Archivo General de la Nación, Bogotá. (Consulted 29/03/2018)

"Informe sobre el resultado de una comisión que les fue conferida para visitar las regiones del Golfo de Urabá" and it enumerates the geographic and environmental attributes that make Urabá God's gift to banana farming: the depth of the water and shape of the land for the development of a port in Turbo, the frequency and duration of rain, the gradation of the landscape, the lack of local inhabitants and the idleness of mines once occupied by slaves, the potential of national enterprise with the help of foreign start-up capital. The commission celebrates the map it has acquired of the region from a "Señor Don Alfredo White" (what kind of name is that? Anglo-Italian? Anglo-Spanish?) who, "entusiasta por el progreso del país" kindly provided it. [This immediately reminds me of the time I stood on the banks of the Rio Salaquí with people who had been displaced by Operación Génesis, the joint military-AUC operative in 1990. We had gone to examine a massive hole left from the shelling, still visible twenty years after the fact. "Gringos came in the 60s and 70s to measure (measure what? For what kind of "progress"?). Then the violence started."]

Image 2: Dear Minister of Public Works[34]



Señor Ministro de Obras Públicas.

58

E.S.D.

Yo, Andres E. Corrales, mayor de edad y vecino del Municipio de Turbo, á Ud. con todo respeto manifiesto:

Deseo obtener en adjudicación á cambio de bonos territoriales, una extensión de tierras baldías no menor de cinco mil hectáreas (5.000) en la región situada en una de las costas del golfo de Urabá, para fundar una bananera á estilo de la que se está fundando en esa región.

Como empresas de esta naturaleza demanda gastos de consideración he formado un Sindicato con capital inglés en cantidad suficiente para atender á esa empresa.

[34] Corrales, Andres. 23 August 1911. "Señor Ministro de Obras Publicas." Baldios Archive, Archivo General de la Nación, Bogotá. (Consulted 29/03/2018)

In the Bibliotheca Nacional, I find a report,[35] *supposedly about the conflict between United Fruit and the banana cooperative, that was presented to Congress in 1930. Actually, it hardly mentions the massacre of 1928, or the labor conditions that occasioned the uprising of banana workers. Instead, it focuses on technocratic considerations, ie. national sovereignty as predicated on the jurisdictional-legal ability of Colombia to manage private property rights and rights to natural resources, such as water.*

In this document, I see Baars' point: lines of commerce are drawn first, followed by nation-building/sovereignty under nominally, but not material conditions of equality as promised under the Law. Thus, the commission begins by enumerating on the assets built by the company, spanning from its vertically integrated supply chain to its railroad. "La independencia política siempre será poco más que un nombre, si no recibe la consagración de la independencia industrial y comercial"(p. 6). National sovereignty in many ways becomes predicated on, and contradictorily, dependent on corporate-drawn commerce, while at the same time building practically separate (but intersecting) spheres of law. Colombia recognizes the challenge—and opportunity—of (inter)national economic interests to a budding national sovereignty. Thus,"[se estima] viable un empréstito para la nación" in United Fruit's already operative canal, "sea por compra o expropriación" (p. 8). Furthermore, given the "enorme riqueza" of the banana industry, the nation (or better put, members of the Global Capitalist Class) see an opportunity in using such money for the sake of internal colonization (nation-building) within Colombia. In this way, the fact that as a commission, "vemos la necesidad de la estabilidad de la propiedad en la zona bananera," to establish legitimate and illegitimate "colonos" is directly related to its own end: "reconocemos especial interés en la colonización de las tierras aprovechables en la Sierra Nevada" (p. 9).

There is an inherent tension here: state-building is contingent on industrial revenue. Notwithstanding, the commission is bent on "el progreso de la industria y su liberación" (p. 9). If the commission is aware that Colombia cannot parallel the capital accumulated by United

[35] Casas, Enrique, Jose Luis López, Carlos M. Peréz, Rafael Valencia. 1930. "*Informe de la comisión nombrada para estudiar el conflicto entre el United Fruit y la cooperativa bananera*," presented before Colombian Congress on 12 November 1930. Biblioteca Nacional de Colombia, Bogotá. (Consulted: 15/04/2018)

Fruit from "los países cultos," it can gradually obtain some through strategic taxes, resource management, and administration of "baldíos" to the advantage of national industry.

The law is the instrument through which these processes are enacted, as Baars points out, in nominally equal but materially unequal conditions. According to the commission, there will be more competition in the industry once the state establishes and protects it (ostensibly through a process of internal colonization). With this process, furthermore, "se establecería el equilibrio jurídico que se echa de menos en la zona" (p. 15). In this vein, judicial stability and development, as the commission sees it, is a byproduct of industry, not a precursor. It is here in the report when the commission scratches its head over what Baars succinctly explained as the power imbalance hidden by Law. Colombia desires to develop the legal standardization to be nominally sovereign (both in the eyes of its own people and on the world stage) but is still beholden to the already consolidated power of the corporation in private law. The commission notes several issues with the contracts celebrated between Colombian growers and the company. First, that "los atributos del derecho de la propiedad se dividen de manera absolutamente injurídica sobre unas personas todas sus responsabilidades y sobre otras todos sus beneficios" (pp. 13-14). Likewise, in United Fruit's contract "se dispone que si se establece un derecho de exportación u otro tipo impuesto cualquiera sobre el plátano guineo, tales gravámenes serán por cuenta de productor contratista" (p. 14). In other words, the revenue streams recommended by the same commission would create financial hardship and (likely) civil disobedience from the Colombian growers the state wishes to have under its wing.

Of particular concern to the commission is United Fruit's use of litigation in foreign jurisdictions to strengthen its monopoly in Colombia. It cites several examples, including the embargo of a Colombian-owned banana importer in New York by a U.S judge, and a similar action against a British competitor that was consequently run out of business:

*"*Lo cierto es que la United Fruit Company declinó acceder a los arreglos amigables y directos, antes de entablar acción alguna ante las autoridades colombianas, dio instrucciones por conducto de su oficina en Boston, a sus abogados de Inglaterra para solicitar, ante los Jueces de Liverpool, el embargo de parte de sus cargamentos*" (p. 22).*

And:

*"***Desde luego ocurre preguntar porque la United acudió a las autoridades de Inglaterra** después de haber manifestado que consideraba como una violación de sus derechos todo intento de sustraer de la jurisdicción de los Tribunales colombianos" *(p. 22, emphasis my own).*

Most vexing of all is the fact, as noted by the commission, that even if local jurisdiction wishes to take on a case involving Colombian growers and foreign companies, it could not as none of these businesses (including Colombian banana cooperatives) had "personería jurídica" in Colombia. As the commission points out, "No dejaría de obrar también en el ánimo de la United Fruit Company para su selección deliberada de fuero extranjero, la consideración de las ventajas que para ella resulta de una jurisdicción extraña, que está a enorme distancia del centro de los acontecimientos..." (p. 23).

In closing the report, the commission quotes former minister of Foreign Relations, Francisco Samper Madrid:

*"*La excesiva confianza, la imprevisión legislativa con respecto al contingente que nos viene de fuera, lo mismo que el manejo desacertado de los recursos naturales del territorio que nos ha correspondido, pueden comprometer, fatalmente, la autonomía absoluta de la República, sin la cual Colombia no merecería existir*" (p. 24).*

What strikes me about Samper's statement is its parallel to popular discourse today in terms of the raison d'etre of the state in relation to the corporation. Two important conversations are however obscured by this focus. For one, the symbiosis of the growth of a liberal state with corporate led cash (or power, geographic, etc.) streams, and secondly, forever parallel systems of private/public law that overlap at times, but nonetheless maintain optical distance between members of the global capitalist class .

Chapter 2: "How many times can we try and get Chiquita and fail?"

"Legal trouble does not mean you cannot fulfill your [Anglo-Saxon corporate] teleological purpose."

—Taylor Mason in Billions, Season 3:
The Wrong Maria Gonzalez

2A: A Corporate (Un)accountability Map of Chiquita's Crimes in Colombia

Chapter 1 provided a theoretical framework for understanding the bifurcated development of the corporate entity in private and public areas of the law, and posited that the corporation has an unresolved problem of representation. The present chapter provides a summary of Chiquita's legal history, in the public legal realm of responsibility, in regard to its admitted financing of guerilla and paramilitary groups in Colombia from 1989- 2004. Rather than analyze the minutiae of each case, I wish to provide an introduction to major judicial milestones in order to a) zoom out, as Baars does, to question how the legal tools currently in practice fit into a larger political economy context and b) highlight some of the recycled contradictions within the current corporate accountability regime in terms of the crisis of representation. If the below inventory is admittedly incomplete, what stands out nonetheless, is the ineffectuality of at least thirteen years of litigation to bring Chiquita or its executives to account (or many more, from the perspective of United Fruit's crimes in Colombia). As one attorney who previously litigated on one of the Alien Tort Statute civil claims told me in an interview:

"Chiquita is the grand experiment, right? If you do something that bad, and you admit to it, and everyone knows you did it, and then no one goes to jail, you only pay a fine to the DOJ [U.S Department of Justice], you never give anything to any victims...how many ways can we try and get Chiquita and fail?" [36]

[36] Anonymous informant #1 (2017, July 21, personal interview). Chicago, Illinois.

I have chosen not to name several of the lawyers interviewed for this thesis for two reasons. For one, while I am curious about the ways in which cause lawyers and human rights activists (and I include myself in this latter category) may unwittingly contribute to the prolongation of corporate reification despite our goal of corporate accountability, I do not wish to blame particular individuals for this. In reality, I have deep respect for many cause lawyers who are putting their training to use to find creative solutions to the deeply complex and historic contradictions of the law and global order. Second, I am aware that many cause lawyers face retaliation for their work. Naming them is simply unnecessary for the goals of this thesis.

Importantly, all relevant litigation detailed below began after 2007, the year in which Chiquita Brands pled guilty to one count of knowingly engaging with a terrorist organization without permission from the Office of Foreign Assets Control before the United States Department of Justice. The DOJ investigation of Chiquita and resulting plea will be examined in Chapter 3, but it is important to keep in mind that the criminal and civil litigation against the company was made possible by its 2007 guilty plea. Barring it, Chiquita's crimes would likely today enjoy the same hermetic shroud as those alleged of Dole, Del Monte, Coca Cola, Occidental Petroleum, and Drummond (among others) in Colombia, which have yet to receive even a fraction of the attention so far given Chiquita in the justice system. Chiquita is wholly unique as a corporate accountability experiment because of how much of its "dirty laundry" has crossed into publicly available information through leaks, freedom of information requests (the Chiquita Papers),[37] and paramilitary testimony to the press, in addition to its guilty plea.

Thus, Chiquita provides the opportunity to examine how impunity has so far persisted despite two main tools brought to bear on it from the corporate accountability movement post Nuremberg: advocating for corporate liability in international criminal law (ICL) and the attempt to marry IL obligations and civil and/or criminal law in host or home states (in Chiquita's case, through civil tort law in the United States, and criminal law in Colombia). This chapter examines this recent history and aims to make sense of it in light of the historical framework provided in Chapter 1. Table 1 provides a quick-reference summary of some of the points elaborated in this chapter in order to answer, how many times can we try to get Chiquita and fail? (To date, about a dozen.) The chart's color scheme denotes what are two basic angles from which the corporate accountability movement maneuvers. The first (green, in varied shades, to distinguish between Colombian and US-based litigation) derives from those strategies that interpret the corporation to

Informant #1 abandoned ATS litigation after her experience working on Chiquita's case (and others). She currently investigates creative legal solutions to corporate accountability, particularly within the private realm of law (contracts, patents, intellectual property) as an alternative to the limitations of the public realm I outlined in Chapter 1. In 2017, I spent a month working with her in Chicago to get to know her approach and insight. Many of the ideas fleshed out in this thesis dovetail with her innovative approach, and I am grateful to her for the candor she shared with me about her own disenchantments borne of litigating against Chiquita.

[37] The Chiquita Papers (I and II) are discussed in greater length in Chapter 3. These archives of internal company documents were published by the National Security Archive at George Washington University and can be accessed at: https://nsarchive.gwu.edu/project/chiquita-papers

have obligations under IL, therein bringing suits before home or host state courts (ie. those courts with jurisdiction where a multinational is traditionally incorporated or where its subsidiary operates). On the other hand, those who do not interpret the corporation to have obligations under IL (purple), generally advocate for an amendment to the International Criminal Court statute, which has jurisdiction over some core crimes (ie. against humanity, genocide, torture), but not over corporate subjects. (The information in blue denotes the executive or federal agency action of the US government, which is discussed in Chapter 3.) Importantly, each of these avenues ignores the "structure of irresponsibility" of the corporate form as expressed in Chapter 1, taking it for granted, as well as the foundational relationship between corporate power and international law which, paradoxically, is also seen as the best hope for making the entity accountable.

This chapter aims to go beyond the explanations of the content of the law to explain why Chiquita has not yet been held to account, seeking also to discern what aspects of the form of law and the corporation continually resurface as ghosts "haunting" the ability of promised corporate accountability to be realized.

Table 1: Corporate (un)accountability map of Chiquita's crimes in Colombia

Sources: cited and explored in greater detail throughout Chapters 2 & 3

Case, decision, action	Legal personality of defendant (entity/ individual)	Authority / Juris-Diction	Alleged crime(s)	Relevant legislation	Status/ Contradictions

SEC v. Chiquita Brands International (2001)	CQB (entity)	SEC	Bribing a foreign official for the use of Turbo port	Foreign Corrupt Practices Act	CQB settles and paid fine to SEC without admitting or denying the Commission's findings. Despite having open access to CQB books for several years, SEC does not refer armed group payments to DOJ. CQB made to cease and desist from violating FCPA provisions, ie. crimes viewed as correctable auditing issue, rather than as a Justice Department issue.
Chiquita guilty plea agreement with Department of Justice (2007)	CQB (entity)	DOJ	Knowingly engaging with a terrorist organization without permission from the Office of Foreign Assets Control, Material support of a terrorist organization	50 USC § 1705, 18 USC § 2339B	CQB pled guilty to: one violation of 50 USC § 1705 for its payments between September 2001- January 2004, agrees to $25 million dollar fine paid over five years, maintenance of a compliance and ethics program, five years' probation, and cooperation in future investigations. More serious offense of 18 USC § 2339B (prohibiting material support of a terrorist organization) abandoned completely by DOJ. Investigation spurred by a CQB board of director, *not* by supposed joint SEC/DOJ enforcement. Investigation/prosecution of CQB executives dropped.

Colombian National Class Action (2007)	CQB (entity)	US federal court: New Jersey, Washing-ton, D.C	Torture, extrajudicial killings, war crimes, and crimes against humanity	Alien Tort Claims Act, Torture Victims Protection Act, Colombian Law	Eventually consolidated in Multi-District Litigation case
Colombian National Class Action (2007)	CQB (entity)	US district courts: Florida, Manhat-tan	Torture, extrajudicial killings, war crimes, and crimes against humanity	Alien Tort Claims Act, Torture Victims Protection Act, Colombian Law	Eventually consolidated in Multi-District Litigation case
Colombian National Class Action (2008) consolidates 6 similar class actions brought in 2007	CQB (entity)	US District Court for the Southern District of Florida	Torture, extrajudicial killings, war crimes and crimes against humanity	Alien Tort Claims Act, Torture Victims Protection Act, Colombian Law	Multi-District Litigation (MDL) Case

Additional consolidated class actions amount to some 4,000 Colombian National plaintiffs (2011)	CQB (entity)	US District Court for the Southern District of Florida	Torture, extrajudicial killings, war crimes and crimes against humanity	Alien Tort Claims Act, Torture Victims Protection Act, Colombian Law	Multi-District Litigation (MDL) Case. 2011 & 2012: District judge approves admissibility of ATCA, TVPA, and Colombian law for claims
Cardona, et al v. Chiquita Brands Int'l (2014)	CQB (entity)	US 11th Circuit of Appeals	Torture, extrajudicial killings, war crimes and crimes against humanity	~~Alien Tort Claims Act, Torture Victims Protection Act, Colombian Law~~	On appeal, federal court rules that: -TVPA cannot be used because it doesn't apply to corporations -ATCS doesn't have sufficient U.S connection, thus barring its application to the claims (decision based on 2013 "touch and concern test" of *Kiobel v. Royal Dutch Petroleum*)
150 plaintiffs bring class action against specific CQB executives (2017)	Individual CQB executives		Funding, arming and supporting terrorist groups in their violence against	State law, Colombian law	After *Kiobel* and *Cardona,* ATS strategy against Chiquita-entity "dies." Claims redirected under state law against individuals. Ongoing.

			civilian population		
Earth Rights International (200 Colombian National plaintiffs) (2020)	CQB	US District Court: New Jersey	Funding, arming and supporting terrorist groups in their violence against civilian population	State law, Colombian law	After *Kiobel* and *Cardona,* ATS strategy against Chiquita-entity "dies." Claims redirected under state law against individuals. Ongoing.
Colombia's Office of the Attorney General (Fiscalía) (2007)	Individual CQB executives	Fiscalía Especial-izada 33, Medellín	Aggravated conspiracy to commit a crime	Colombian criminal law (Jurisdic-ción Penal Ordinaria)	"Preclusión por extorsión", case archived.
Colombia's Office of the Attorney General (Fiscalía) (2013)	Individual CQB executives	Fiscalía Especial-izada de derechos humanos, Bogotá	Aggravated conspiracy to commit a crime	Colombian criminal law (Jurisdic-ción Penal Ordinaria)	Preclusion revoked on the basis of paramilitary Justice and Peace testimony.

Colombia's Office of the Attorney General (Fiscalía) (2018)	Individual CQB executives	Fiscalía Especial-izada de derechos humanos, Bogotá	Aggravated conspiracy to commit a crime (since 2017, a crime against humanity)	Colombian criminal law (Jurisdic-ción Penal Ordinaria)	Charges brought against 13 CQB executives, several of whom worked in Cincinnati Only forum where financing conflict is tantamount to a crime against humanity (unlike in US). Would require U.S cooperation
~~Jurisdicción Especial para la Paz~~	~~Individual executives~~				~~"Terceros" not obligated to appear~~ ~~Chiquita no longer exists in Colombia~~
Human rights organizations – CAJAR, FIDH, Harvard Legal Clinic (2017)	CQB	ICC (Office of the Prose-cutor)	Complicity in crimes against humanity	Article 15, Rome Statute	Article 15 requires the OTP "analyse the seriousness of the information [it] receives." However, ICC mandate has no jurisdiction over corporate subjects.

2B: Civil state-centered solutions in the US, the "ATS is dead," and Pirates Inc.

The history of how the Alien Tort Claims Act (ATS-Alien Tort Statute) came to be and die is one that encapsulates a several-century run and apparent outgrowth of state-centered approaches to international law. One of the first laws to be passed in the U.S congress in 1789, the statute was practically inoperative during two hundred years of judicial history. Then, in 1984, a landmark decision in *Filártiga v. Peña-Irala* set precedent for a three-decade boom of ATS "cause lawyering"[38] that would bring several hundred civil penalties in U.S courts upon dictators, statesmen, and, eventually, corporations for crimes committed the world over. This

[38] Grietje Baars (2016) elaborates this concept brilliantly in *"It's not me, it's the corporation": the value of corporate accountability in the global political economy*. Baars draws on the definition of "cause lawyers" as provided by Sarat and Scheingold: "lawyers who commit themselves and their legal skills to a vision of the good society." A Sarat & S Scheingold (eds), Cause Laywering (Oxford UP, 1998) 3.

human rights law bonanza ended abruptly in 2013 with the U.S Supreme Court (SCOTUS) ruling on *Kiobel v. Royal Dutch Petroleum.*[39] The present section examines the rise and fall of the Alien Tort Statute, particularly as relates to its failure to render accountability on Chiquita Brands.

The events that spurred the passage of the ATS are oddly fit for fiction. In 1784, the French ambassador to the United States was allegedly defamed by Charles Julian de Longchamps, also a Frenchmen, albeit of more questionable nobility. Jurisdictional authority was complicated by the fact that the alleged row had taken place at the French embassy, in French territory. A diplomatic crisis ensued when a U.S judge denied the expulsion of Longchamps to France for trial. In essence, the U.S had no legal method for holding Longchamps to account, and, in France's view, was harboring a criminal, thus calling into question the status of the fledgling nation in the international community. After an escalation in which other nations threatened to withdraw diplomats from the young American nation, a Philadelphia judge effectively drew a parallel to this "jurisdiction-less" case to the international treatment of pirates on the open sea. The judge argued that some acts are so heinous in nature that an international consensus is assumed, whether there are laws on the books or not. In this way, Longchamps was ultimately named an "enemy of mankind," just as was done with pirates, effectively equating his misdeed to a crime against the whole world. As a result of this diplomatic crisis, the U.S, a new nation in need of international legitimacy, passed the Alien Tort Statute in 1789.[40]

The intent of the ATS was to connect U.S law to the law of nations (international law). The ATS is a single sentence: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[41] While today's critics of the ATS cite the extreme specificity of the ambassadorial spat that spurred the law's passage, the Longchamps scuffle was but one of the intended purposes of the law. In addition to offenses against ambassadors, the ATS was also meant to give jurisdiction to the U.S to prosecute law of nations crimes (which the statute does not specifically define) which, in the context of 1789, included crimes of maritime piracy and the violation of

[39] For a primer on the history of the ATS, see Abumrad, Jad. "Enemy of Mankind." More Perfect. WNYC Studios. Podcast audio, October 23, 2017.
[40] Abumrad, Jad. "Enemy of Mankind." More Perfect. WNYC Studios. Podcast audio, October 23, 2017.
[41] 28 U.S Code § 1350- Alien's action for tort

safe conducts.[42] Precluding that the young nation become a shelter for violators of international law was of utmost importance to Congress in 1789. The ATS was used a handful of times in the years to come to, for example, prosecute a US citizen in 1795 who "voluntarily joined, conducted, aided, and abetted a French fleet" in attacking the British Colony of Sierra Leone, as well as "plundering or destroying the property of British subjects on that coast."[43] To understand the ATS' eventual resurgence, there are several aspects of this history worth emphasizing: 1) the statute gives civil jurisdiction to US district courts to prosecute (undefined) law of nations crimes (torts) or treaty violations in foreign territory brought by an alien (foreigner), 2) with the intention of preventing the US from becoming a shelter for enemies of mankind who have committed egregious crimes abroad, and 3) to demonstrate the nation's commitment to international law and the community of nations. Despite its rather dramatic birth during the Longchamps political crisis, the ATS lay practically dormant for the next 200 years.[44]

ATS 2.0

By the time the ATS was dusted off in the 1980's, the world had changed drastically. Following the Holocaust, worldwide consensus formed around the need to condition state sovereignty on a basis of human rights (Baars 2017). The U.S had tarnished its reputation in the Vietnam war and established a banner of globalized human rights to regain its moral standing (see the section on the FCPA in Chapter 3 for more on crisis management legislation, following Vietnam, that came to bear on Chiquita's accountability). The Cold War was afoot, stoking 'American exceptionalism.' In this context, researchers at the Center for Constitutional Rights (CCR) dug up the ATS, putting it to use for a Paraguayan plaintiff (Filártiga) suing a Paraguayan defendant (Peña-Irala) for torture and an extrajudicial killing committed in Paraguay. Dolly Filártiga, the sister of the victim, had been jailed in Paraguay for her efforts to seek justice. Following her release, she moved to the United States, only to discover that the alleged torturer, Peña-Irala, had also. These details—foreign defendant (living in the US), foreign plaintiff (living in the US), foreign crime—are important. If the ATS had allowed for district courts to have jurisdiction over

[42] I am not knowledgeable about the doctrine of safe-conducts, and it is not relevant to the aims of this thesis. I understand safe conducts to pertain to war or peacetime situations in which the commercial property rights of aliens (on the high seas, or otherwise in foreign territory) could be at risk.
[43] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013)
[44] Abumrad, Jad. "Enemy of Mankind." More Perfect. WNYC Studios. Podcast audio, October 23, 2017.

any "civil action by an alien for a tort only, committed in the law of nations or a treaty of the United States,"[45] was it meant to be used like *this*, to prosecute any crime from around the world?[46] Would the US turn itself into a global human rights court?

In bringing the ATS case, the CCR argued that torture was, like piracy, an enemy of mankind: They won on appeal, with the court agreeing: "'[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.'"[47] In this way, the 1984 *Filártiga v. Peña-Irala* decision set new precedent, virtually revolutionizing human rights litigation in the U.S and birthing a movement of cause lawyers litigating global abuses in the U.S under the ATS that would last for over thirty years. As boasted by John Bellinger, legal advisor to the U.S Department of State from 2005-2009, the ATS has been "the source of almost all significant human rights litigation in the United States and indeed in the world."[48] Bellinger's statement, if glorified, is reflective of the general enthusiasm that accompanied the statute's resurgence. Ever since, the ATS has become the arena in which U.S courts have wrestled with a number of debates about the state application of international law and human rights doctrine. These debates encompass not just practical jurisprudential considerations, but also economic and political deliberations. As such, the ATS is a privileged mechanism for examining shifts in the international order, and of its favored subjects, as I will show.

Neo-colonial Court Room Narratives of the 1980's

A historical distortion in narratives built by ATS cases from the 1980's onward has been pointed out by a number of scholars (Davidson 2016, Kohl 2014, Mattei and Lena 2000-2001). As stated

[45] 28 U.S Code § 1350- Alien's action for tort

[46] I will not go into great detail about these issues here, but I concur with Earth Rights International (an NGO that specializes in ATS litigation) that the "ATS does not impose US law because only accepted, universally- agreed international norms can be applied…the ATS does not in any sense project U.S law around the world. (The U.S does that in all kinds of other ways, of course.)" In *Filártiga*, the plaintiff was in the United States as was the defendant, making the US party to Filártiga's avoidance of justice in Paraguay. Unfortunately, the fear of the ATS getting used to make the US the world's "policeman" would later become relevant in *Kiobel*, as I explore later in this chapter. For more on the misconception that the ATS enables the US to act as the world's court, see: https://earthrights.org/blog/a-few-imperfections-in-radiolabs-more-perfect-story-on-the-alien-tort-statute/ Here, I will criticize the historical narratives built by the ATS, not that domestic application of international law is problematic.

[47] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)

[48] Abumrad, Jad. "Enemy of Mankind." *More Perfect*. WNYC Sudios. Podcast audio, October 23, 2017.

above, the ATS has since its adoption been controversial in that it often raises alarm about international sovereignty and foreign relations. Natalie R. Davidson argues that the resurgence of the ATS as an innovative legal accountability tool has come at the expense of further obscuring foreign policy power relations, namely the U.S involvement in state-centered crimes abroad. Davidson focuses on the historical narratives produced by *Filártiga v. Peña-Irala* and *In re: Marcos Human Rights Litigation*,[49] the first two ATS cases argued in federal court in the 1980s. Both cases, as Davidson points out, failed to shed light on the U.S relationship with Peña-Irala (an Inspector General of Police under the U.S- backed Stroessner regime in Paraguay) & Ferdinand Marcos (a former dictator of the Philippines). In the first instance, the U.S connection was argued as deteriorating relations with Paraguay in the face of the U. S's stated commitment to end human rights abuses. In the second instance, "the plaintiffs insisted on their lawsuit's compatibility with US foreign policy and in doing so whitewashed decades of US complicity in torture" (Davidson 2016: 12). Both cases effectively "recast as entirely foreign violence in which the US executive[50] was deeply involved" (Davidson 2016: 3). In both scenarios, the U.S could refashion its role as direct enabler of systemic torture to savior of torture victims. Furthermore, the *Filártiga* narrative was criticized for its focus on Peña-Irala as an individual, distorting the broad and systemic use of torture of which he was a mere part. By contrast, Marcos' violations *were* presented as systemic state policy. But in both instances the ATS distanced the U.S from the "enemies of mankind" being cast in the courtroom. Says Davidson,

> *"[…] In the 1980s, 1990s and 2000s, cases relating to Argentina's dirty war, the Indonesian repression in East Timor, and gross abuses in Guatemala, Chile, and El Salvador, all by military forces widely known to have been armed, funded, or otherwise supported by the United States, were retold as foreign violence having no connection to the United States, other than the fact that the plaintiffs had found refuge there, and this* despite courts' sometimes detailed exposition of the historical context.*"*[51]

[49] *In Re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995)
[50] Executive government, not to be confused with business executives.
[51] Many lawyers would be deeply offended by the assertion that ATS cases do not further the clarification of the truth about U.S interventionism. Many are activists who work directly on U.S accountability for human rights abuses abroad, releasing extensive reports based on information gathered through their case work (to the extent it is not limited under seal, which is a challenge). As Earth Rights International points out, ATS work has had an important "truth-telling" function because victims are able to tell their stories in court, far from real threats they may

(Davidson 2016:36, emphasis my own)

For Davidson, the result of this refashioning of history has been to bolster the U. S's image as a "do-gooder" on the world's legal stage, the erasure of the appearance of U.S interventionism in the affairs of nations, and the reduction of structural problems to the limited prism of individual stories. In this way the ATS could be seen to solidify the post or neo-colonial relationship of the U.S with other nations. Whether or not cause lawyers building ATS cases at this time can be seen as responsible for this narrativization exceeds my investigative focus; I mention the existence of the debate because of my main interest in the swiftness with which ATS jurisprudence grew, seemingly unfettered, alongside such narratives but was swiftly derailed once the legal tool was brought to bear on corporate violators of analogous crimes.

Tectonic Shifts

If the 1980's represented a bonanza for domestic human rights litigation under the ATS— albeit one that arguably reinforced neocolonial narratives— ATS litigation in the 1990s and early 2000s was characterized by the refinement—and, conversely, creativity—over which rights were conferred by international law under the statute. Judges deliberated on the way causes of action should be defined, "when neither international law or federal law explicitly provided a right to sue for human rights abuses" (Prince 2011: 75). The *Filártiga* and *Marcos* rulings had successfully argued that torture fit the bill, but what else? If torture had been deemed analogous to international crimes like piracy and slavery, what other "enemies of mankind" could the statute cover? Still, there was legitimate concern that an uptick in ATS cases presented by foreigners could result in foreigners having more access to U.S courts than citizens. Both of these issues were tackled by Congress' passage of the Torture Victim Protection Act (TVPA) in 1991 as subset of the ATS.[52] Since 1991, ATS and TVPA cases have become somewhat

face in their home countries. See Earth Rights International's opinion on this matter here: https://earthrights.org/blog/a-few-imperfections-in-radiolabs-more-perfect-story-on-the-alien-tort-statute/. Importantly though, a distinction can be made between the facts and detailed context discussed in a courtroom and the broader narrative built in court decisions, the press, and by casual observers about the ability of US courts to provide remedy to those who may have been failed by other (foreign) systems, even if said systems were weakened by US interventionism.

[52] There has been some debate as to whether the TVPA was passed in order to eventually displace the ATS. I researched this with the intention of understanding how the TVPA may have arisen in a neoliberal jurisdictional order to answer to rising U.S foreign interventions (and torture). It seems, however, that both congress and courts have upheld over time that the TVPA and ATS have mutually reinforcing roles, and that one cannot replace the

intertwined legal strategies, thus improving the legitimacy concerns surrounding causes of action[53] under the ATS alone. There are some fundamental differences between the scope of the two laws, however; the TVPA excludes corporations from liability and has a ten-year statute of limitations, while the ATS is not limited to individuals and has no statute of limitations (Apostolova 2010). Importantly, however, *which* international rights would be admissible under the ATS remained an open debate, one which was usually resolved through piecing together ATS claims with other statutes such as the TVPA.

With these developments, the ATS was gaining credibility. Case law was now delineating the types of abuses covered by the statute. A 2004 SCOTUS decision in *Sosa v. Alvarez Machain*[54] largely affirmed the usage being given to the statute, even while encouraging the discretion of judges in deciding which "laws of nations" (universally recognized torts) should be included in the jurisdiction. As case law grew, attorneys could better argue the cases of their plaintiffs and improve the burden of proof presented, based on ever-increasing analysis of the statute and its doctrine. This favorable trend was not to continue, however. As ATS attorneys began to use the statute to sue corporations for their misdeeds abroad, ATS jurisdiction was about to be completely derailed.

Kiobel v. Royal Dutch Petroleum*: A Conjuncture?*

Now a tried-and-true mechanism for deliberating on torts in violation of the laws of nations, a flurry of ATS cases were brought against both U.S- and foreign-based multinationals, starting in 1997.[55] But did personal liability extend to corporations? If a corporation had planned and facilitated the torture and murder of Dolly Filártiga's brother in the same way as Peña- Irala had,

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other. I will not go into the details of how they interact here, but others have done so. For a good primer see: Ekaterina Apostolova. The Relationship between the Alien Tort Statute and the Torture Victim Protections Act, 28 Berkeley J. Int'l Law. 640 (2010).

[53] This is because the TVPA is directly linked to an international treaty: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the U.S ratified in 1990. http://iraadvocates.org/about-torture-victims-prevention-act-tvpa. For the purposes of this thesis, I wish to highlight that existing international treaties *or* congressional legislation can dispel worries about what kind of human rights abuses or laws of nations are applicable under the ATS.

[54] *Sosa* v. *Alvarez-Machain*, 542 U. S. 692 (2004)

[55] The New York Times. 17 April 2013. "A Giant Setback for Human Rights." Available at: https://www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html (Consulted: 05/14/2019)

could the corporation be held liable? Increasingly, cause lawyers were arguing such cases.[56] Several tensions made this question a difficult one. First, international law does not recognize corporate civil or criminal liability, though "[International law] leaves the manner of enforcement, including the question of whether there should be private civil remedies for violations of law, almost entirely to individual nations" (Prince 2011:58). This means that the U.S can decide itself whether or not civil corporate liability should be enforceable under the ATS. Many believed the ATS, created in the 18th century to handle maritime piracy, offenses against ambassadors, and the violation of safe conducts, could not have foreseen the rise of the multinational in the global structure;[57] as such, more "modern" legislation, such as the TVPA, "rightly" excluded corporate liability. This debate would continue at the circuit court level, with judges ruling both in favor of and against corporate liability under the ATS, until 2013.

In 2013 the SCOTUS decision on *Kiobel* brought almost all pending ATS litigation to a standstill. In *Kiobel,* Nigerian plaintiffs accused Royal Dutch (a Shell subsidiary) of aiding the Nigerian military dictatorship in the torture and execution of activists who had led a popular uprising against Shell activities in the Ogonilands. The issue of corporate liability was not taken up by the court as expected. It instead focused on the application of extraterritoriality under the ATS. The SCOTUS opinion announcement read, "The question is whether the US courts can hear a case such as this brought by foreign plaintiffs against foreign defendants over events that occurred on foreign soil."[58] On the scope of extraterritorial admissibility, the court opinion further stated that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against exterritorial application. Corporations are often present in many countries, and it would reach too far to say mere corporate presence suffices."[59] Importantly, no guidelines were provided as to what sufficient touch and concern to the U.S may be (Chiquita would become the yardstick for the "touch and concern test"), though the above excerpt points out that "mere" corporate presence does not

[56] See: *Doe v. Unocal* (2002), *Corrie v. Caterpillar* (2005), *Balcero Giraldo et al., Romero, et al., & Estate of Valmore Lacarno Rodriguez v. Drummond Company* (2007), *Sinaltrainal v. Coca-Cola Co.* (2009), *Wiwa v. Royal Dutch Shell Co.* (2009), *Doe v. Exxon Mobil Corp* (2014), *Doe v. Néstle USA, Inc.* (2014), *Cardona, et al. v. Chiquita Brands Int'l* (2014)

[57] As outlined in Chapter 1, this is a deeply ahistorical reading of the relationship between law and the corporate form since the 13th century.

[58] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013)

[59] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013), majority opinion delivered by Justice Roberts

constitute cause to displace the presumption against extraterritorial application. Extraterritoriality, arguably the linchpin of the ATS, the reason for which the diplomatic crisis of 1784 had arisen, and the mechanism through which domestically enforced international norms had developed in the U.S, was now lifeless. 65% of the ATS cases pending at the time of the *Kiobel* decision were dismissed on grounds of extraterritoriality.[60] But this was not the only important use of the ATS. What about today's pirates who, the entire Supreme Court agrees, "are fair game wherever found, by any nation"?[61] The ATS also had the important precedent of prosecuting US citizens for piracy crimes abroad. In focusing on extraterritoriality, the Court skirted any indication of myriad other uses of the statute in which a US connection—a US defendant even—may apply.

"Pirates Inc."

Several justices (Breyer, Ginsburg, Sotomayor, Kagan) disagreed with the reasoning of the Court majority on extraterritoriality, noting the ways in which the application of such a principle would only encourage that the US become a safe haven for criminals of crimes committed abroad, in spite of the avoidance of such an outcome being a driving motive of the passage of the ATS. During oral arguments on February 28, 2012 Justice Stephen Breyer said the following:

> *"And the principle that here would apply is what I said, Pirates, Incorporated. Do you think in the 18th century if they'd brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, oh, it isn't me; it's the corporation—do you think that they would have then said: Oh, I see, it's a corporation…Good-bye. Go home."*[62]

Of the SCOTUS decision, Circuit Judge Pierre Leval pointed out that "According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form" (Prince 2011:57) And also, "[M]y colleagues' new rule offers secure protection

[60] Institute for Legal Reform. "Lawsuits Against Corporations Under the Alien Tort Statute" https://www.instituteforlegalreform.com/uploads/sites/1/Lawsuits_Against_Corporations_Under_the_Alien_Tort_Statute_pdf (Consulted: 11/27/18).
[61] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013)
[62] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013); oral arguments available at: https://www.oyez.org/cases/2011/10-1491

for the profits of piracy *so long as the perpetrators take the precaution to incorporate the business*" (Prince 2011: 57, emphasis added).

According to one ATS lawyer,

> "Kiobel *was a horrible case because it was called foreign law cubed, or there are various ways to put it, but the defendant was a foreign corporation, the plaintiffs were foreigners, and all the events occurred in Nigeria. So that is a stretch. But if any of those people were resident in the US… The judges that concurred* and *said touch and concern [tests] make[s] no sense, they created a different test which was that if you have jurisdiction over the defendant in the US, or the plaintiff, or some of the events occurred in the US, then that is a sufficient nexus to bring the case.* And if that were the test, every case we have except Kiobel would be actionable under the ATS. *"*[63]

If the entire Court agreed with the dismissal of the case, two main interpretations had formed among judges as grounds for dismissal. On the one hand, among conservatives, the ambiguous "touch and concern test," and among the more liberal members of the court, a "nexus" test to avoid situations of "foreign law cubed" and Pirates, Inc. Breyer's opinion (joined by Ginsburg, Sotomayor, and Kagan) said the following:

> *"Considering these jurisdictional norms in light of both the ATS's basic purpose (to provide compensation for those injured by today's pirates) and* Sosa's *basic caution (to avoid international friction), I believe that the statute provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."*[64]

In this section, I have noted the thirty-year ascension of ATS litigation, in which both cause lawyers and federal judges were less concerned with issues of extraterritoriality under the statute—so long as it was applied to foreign politicians, dictators, and military violators of human rights (regardless of the sympathetic or cooperative relationship many of the defendants had enjoyed through US foreign policy). Conversely, I have argued that the extension of ATS litigation to corporate subjects led to *Kiobel*, "a [conveniently] horrible case,"[65] arriving to the

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[63] Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C. Emphasis my own.
[64] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013)
[65] In light of the "neo-colonial narratives" argument, that some cause lawyers would have taken on a "foreign law cubed" case like *Kiobel*—which only ended up undermining the plethora of more legitimate claims, like that of Chiquita victims—does beg the question, *why do it*, if not but for the questionable prioritization of "humanitarian" impulses over foreign sovereignty?

chambers of the U.S's highest court, only to be resolved on an issue that sidestepped the core issue of corporate liability (Pirates Inc.) entirely. The hypocrisy introduced with the introduction of corporate subjects into ATS litigation is summed up nicely by an ATS lawyer's description:

"When [foreign defendants] Marcos *and* Filártiga *went to trial, they had, you know the lawyer they could afford, they had someone who didn't have a clue [about ATS or law of nations doctrine]. In many cases of that sort they simply defaulted, there was no representation on the other side. When we sued Unicol, the first [corporate] case, they got…they burned through a second firm… then they ended up with the most giant firm in the universe… and those firms have relationships with people here [in Washington, DC] and they also get other groups to file amicus briefs. They really use their corporate power to the maximum to lobby congress…That is the big difference. These corporate firms, they even volunteer to help on these dictator cases so they can pat themselves on the back and say, 'see, we do pro bono work.' But the minute we sued a corporation they could not help on any more ATS cases and they are knocking each other over to get one of these cases [to represent the corporations] because they go on forever at a gazillion dollars an hour."*[66]

Chiquita: The Touch and Concern Test

One year after *Kiobel, Cardona V. Chiquita Brands International, Inc.*[67] was decided in U.S federal circuit court. *Cardona* is widely seen as the litmus test on what types of crime could be seen to "touch and concern" the United States, following *Kiobel.* If ever it were possible to displace the presumption of extraterritoriality in the ATS, the facts of *Cardona* should have been more than enough. Unlike the corporations in *Kiobel,* Chiquita was incorporated in New Jersey and headquartered in Ohio. Hundreds of payments to the AUC in Colombia had been directly approved and directed by Chiquita executives from its U.S-based facilities, meaning the crimes were not strictly foreign. Chiquita's Colombian subsidiary was wholly owned, thus displacing any possible arguments based on corporate structure. Furthermore, Chiquita had explicitly hampered stated U.S foreign policy goals by financing a U.S designated terrorist organization (Stylianou 2016). In other words, the "nexus" test proposed by a number of Supreme Court judges would have been fully satisfied, and in spades. Ostensibly, these circumstances should meet the "touch and concern test" of the *Kiobel* majority, even if the Court had deferred from defining its criteria the year prior.

[66] Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C.

[67] *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014)

In *Cardona*, the majority of the court found Chiquita's U.S-based incorporation and the involvement of Cincinnati decision-makers to be completely irrelevant to the ATS touch and concern admissibility test. The *Cardona* court interpreted the touch and concern test of the *Kiobel* decision to mean, in this case, that the AUC murders should touch and concern the *territory* of the United States.[68] Since the murders in *Cardona* had taken place in Colombia, the touch and concern test was cleaved entirely from any consideration of U.S-based aiding and abetting of terrorism. The *Cardona* decision proved the fears of Pirates Incorporated after *Kiobel*. More importantly, it continued in SCOTUS' steps of intentionally avoiding a debate on corporate liability under the statute by introducing surprising and legally dubious arguments about extraterritoriality. If the extraterritoriality argument made some sense in *Kiobel*, it made none in *Cardona*. Of both rulings, an ATS attorney said the following:

> *"These judges who hated the ATS interpreted in such a way in which you pretty much would have had to murder the people in the US, and they pretty much foreclosed any other way you could satisfy the statute. Which of course would make it irrelevant and duplicative of existing domestic criminal law. They know what they did was dishonest, but they did it to get rid of these cases."*[69]

Neoliberal Market Organization and Kiobel

In order to understand how the ATS was so rapidly and ruthlessly dismantled following its application to corporate defendants, it is useful to consider the political economy in which it took place. Uta Kohl (2014) provides a summary of the amicus briefs provided to the Kiobel court prior to its decision. In addition to the numerous corporate lobbyists weighing in on *Kiobel*, various Western governments provided briefs as well (the UK, Netherlands, Germany, Switzerland, Canada, Australia). These actors viewed ATS legislation with extreme uneasiness in regard to extraterritorial application and corporate liability. Kohl examines how these arguments hold up before the common law system, viewing their arguments as weak at best. For Kohl, "the most likely explanation for the reluctance of States to create international corporate criminal liability is economic protectionism[70]" (Kohl 2014: 675). Western nations simply *need*

[68] The majority stated, '[T]here is no allegation that any torture occurred on U.S territory, or that any other act constituting a tort of the ATS touched or concerned the territory of the United States with any force.'" (Sylianou 2016: 111)

[69] Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C.

[70] There is another important point made by Kohl, which is "that the different arms of government do not necessarily pull in the same direction. While US courts were willing to modernize the old statute to meet the

the corporate form for market organization in the international political order. ATS rulings since *Kiobel* have made this opinion ever more explicit. In a more recent ATS case, *Jesner v. Araba Bank*,[71] Supreme Court Justice Kennedy (United States) stated that:

> *"[A]llowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights."*[72]

Such a statement resoundingly echoes the arguments provided in Chapter 1 about the centrality of the corporate amoral calculator to (imperial) governance, the organization of the (even public) legal space according to commerce and, importantly, the furtherance of the capitalizing mission of international law, often *alongside* stated values of human rights. In the era of *Kiobel*, economic fundamentalism in political life is so entrenched that the Supreme Court of the United States can *un-ironically* rule that corporate violations of human rights cannot be punished because the corporation is needed to *spread* human rights.

By following the history of the ATS, I have shown that the law is a social process that bends and stretches according to geopolitical and economic influence. I have suggested that the ATS is an especially privileged statute for examining the relationship between these forces, given the curious circumstances of its birth, resurgence, and rapid demise. Foucault's history of maritime law provides an excellent departure point for comparing the market and jurisdictional orders of

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demands of modern times and still are, albeit more restrictively, the US State Department in many of its amicus briefs, not unlike the European governments, called for a much narrower, historically bound reading of the Statute—as was in fact endorsed by the Supreme Court under not insignificant external pressure" (p. 696). I do not agree with Kohl about the degree of the court's "willingness to modernize," but I do appreciate the point about external pressure (ie. corporate lobbying) and the tensions between different branches of government, something that I examine in Chapter 3 in terms of the treatment of Chiquita by the SEC, DOJ, and US Department of State. Analyzing the interests and treatment of various agencies vis a vis Chiquita provides a view of the intricacies of bureaucratic governmentality and also challenge the assertion that corporations are more powerful than government. To the contrary, "smoke signals" are apparent in these analyses of the government's *use* of the corporate form (and Chiquita specifically) to delegate and accomplish its goals abroad.

[71] *Jesner* v. *Arab Bank, PLC*, 584 U. S. ___ (2018)

[72] Corporate Accountability Lab, "Supreme Court Rejects Liability for Foreign Corporations in International Human Rights Cases." Available at: https://corpaccountabilitylab.org/calblog/2018/4/24/supreme-court-rejects-liability-for-foreign-corporations-in-international-human-rights-cases (Consulted: 04/25/2018).

the age of piracy to those currently existing in the age of Piracy Inc. Consider the following passage:

"The history of maritime law in the eighteenth century was an attempt to think of the world, or at least the sea, as a space of free competition, of free maritime circulation, and consequently, as one of the necessary conditions for the organization of a world market. The history of piracy—the way in which it was consequently used, encouraged, combated, and suppressed, etc. could also figure as one of the aspects of this elaboration of a worldwide space in terms of a number of legal principles. In relation to the suppression of piracy we can say that there was a jurisdiction of the world, which should be thought of in terms of the organization of a market."

(Foucault 2008: 176)

Similarly, the (non)suppression of the corporate form (Piracy Inc.) today is a particular jurisdiction of the world and organization of market. In the history of the ATS, a narrative emerges of legal principles that shift according to the political order of the day— whether post world war liberalism or post-cold war neoliberalism. When the ATS was first passed, international law violations with a potential for personal liability were extremely rare scenarios. Perhaps that is why "at the time the Alien Tort Statute was adopted, corporations could be held liable."[73] Today such violations, driven by the reified Anglo-Saxon corporation, are ubiquitous, and one of the only legal principles barring the corporate subject from accountability is the doctrine of limited liability.

During the oral arguments of *Kiobel*, SCOTUS judges were keenly aware of the implications that the corporate form could suffer should an officer-entity relationship be established under the ATS:

Attorney Edwin Kneedler: [...] Where the corporation itself is liable -- and this would be true in criminal law and presumably in -- in tort law -- would usually require some action by those responsible for running the corporation or high enough up the chain of command—

[73] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013); February 28, 2012 oral argument of Edwin Kneedler, Deputy Solicitor General, Department of Justice, available at: https://www.oyez.org/cases/2011/10-1491

Justice Elena Kegan: When you say in your brief that we should look at this as a remedial question, as a question of enforcement, do you say that because you're thinking of this as a vicarious liability case?

In other words, there's an individual person who clearly has violated a norm of international law, and then the question of whether to hold the corporation liable is an enforcement question; or would you say that it's also an enforcement question when we're talking about direct corporate liability?

Attorney Edwin Kneedler: As Mr. Hoffman said, international law norms proscribe certain conduct, but the enforcement of that is left to each nation.[74]

In the midst of ever-increasing legitimacy issues for the corporate form, the legal system can merely tape over the holes of the limited liability doctrine (in this case by diverting such questions to other issues, like extraterritoriality). The market being managed post- *Kiobel* has nothing to do with the sea or physically imagined "worldspace." Instead, today's Pirates Inc. operate within a commerce of accountability in which well-meaning cause lawyers, plaintiffs, and judges fight for the responsibility "crumbs" leftover in the public realm. What *Kiobel* and *Cardona* show is the ease with which such crumbs are swept up by the judiciary once they become problematic.

The economic fundamentalism expressed by Judge Roberts in the above passage is but one driving force of this ethos of crisis management. A second one is the idea that states should not be responsible for the enforcement of international norms (or only of particular ones like terrorism and corruption, instead of crimes against humanity, or of particular actors, like dictators), deferring such authority to the creation of an as of yet universal jurisdiction. Consider the following debate during the oral arguments of *Kiobel* (bold emphasis added)*:*

Justice Kennedy: "No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection."

[74] *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U. S. 108 (2013); February 28, 2012 oral arguments available at: https://www.oyez.org/cases/2011/10-1491

*Attorney Paul Hoffman Center for Constitutional Rights: "And— and let me start by saying that the international human rights norms that are at the basis of this case for the plaintiffs—crimes against humanity, torture, prolonged arbitrary detention, extrajudicial executions—**all of those human rights norms are defined by actions**.*

They're not defined by whether the perpetrator is a human being or a corporation or another kind of entity.

And so, I think that the— the Respondents [Royal Dutch Petroleum] are wrong when they say that international law does not extend to—to those kinds of acts.

They do— it does….

What they have tried to conflate is the question about whether international law—the international law norms apply to a corporation or a person with whether there's an international consensus with respect to how those norms should be enforced, particularly within domestic civil jurisdiction as opposed to criminal jurisdiction."

*Roberts: "But in the area of international criminal law, **which is just analogous, I recognize**, there is a distinction made between individuals and corporations."*

*Hoffman: "Well, **there's a distinction made within the jurisdiction of certain modern international criminal tribunals** [ie. ICC, International Criminal Tribunal for the Former Yugoslovia, International Criminal Tribunal for Rwanda, etc.].*

*And Respondents take their position too far in this because **what they've said is that the fact that corporations can't be found liable criminally under the International Criminal Court, for example, means that the norms, the underlying norms—genocide, crimes against humanity, and war crimes when it comes to the International Criminal Court—don't apply to corporations.***

And that's—that clearly is wrong because the United Kingdom and Netherlands, for example, the two home countries of these corporations [Royal Dutch and Shell] has passed domestic implementing legislation that imposes criminal penalties for violations of those very norms.

So, there's no question that it can be done.

*What the most important—**I think one of the most important principles in this case is that international law, from the time of the Founders to today, uses domestic tribunals, domestic courts and domestic legislation, as the primary engines to enforce international law**.''*[75]

Hoffman points out an important contradiction in this passage in which the ICC's mandate bars jurisdiction over corporate subjects, and yet the ICC is seen by many, including Justice Roberts, as *the* entity responsible for adjudicating core international human rights crimes (today often perpetrated by an entity it does not recognize). In the same oral argument, Roberts sums up the puzzle nicely:

"*But under international law, it is critically pertinent who's -- who's undertaking the conduct that is alleged to violate international norms.*

If an individual private group seizes a ship, it's piracy.

If the navy does it, it's not.

Governmental torture violates international norms.

Private conduct does not.''[76]

Amidst this mind-boggling landscape of fragmentation, I wish to end with a single conclusion about the status of these tendencies. At its simplest, the birth and death of the ATS puts in relief the willingness of the U.S as a young nation to adopt a state-centered approach to the enforcement of international law, versus the outright tack-change of the 2013 SCOTUS to do just the opposite. The representation of the pirates of the 1800's versus the Pirates Inc. of today is a brilliant metaphor for visualizing the maturation of reification, but the power deferred to international mechanisms—with their own contradictions, as I will explore in the next section—I

[75] *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013); February 28, 2012 oral arguments available at: https://www.oyez.org/cases/2011/10-1491
[76] *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013); February 28, 2012 oral arguments available at: https://www.oyez.org/cases/2011/10-1491

suspect is also a historic loss that needs uncovering (and remembering) in order for the promise of corporate accountability to stand a fighting chance.

2C: Criminal state-centered solutions in Colombia and ICC aspirations

In May of 2017, the International Human Rights Clinic at Harvard Law School, the José Alvear Restrepo Lawyer's Collective, and International Federation for Human Rights submitted a request to the Office of the Prosecutor (OTP) of the International Criminal Court to have it expand its examination of Colombia's efforts to provide accountability for Rome Statute crimes to include the integrity of the country's investigation of Chiquita executives. During the public presentation of the request, leaders from the Peace Community of San José de Apartadó highlighted the arrival of paramilitarism to Urabá with the help of the business community (including Chiquita) in the late 1990s and its continuation today.[77] Meanwhile, advocates from the above-mentioned organizations requested that the OTP monitor the application of ICC standards in Colombia's ongoing investigation of the "Chiquita Suspects." Importantly, the Rome Statute does not recognize corporate subjects (ie. Chiquita as entity), but the identities of more than a dozen Chiquita employees involved in the payments are publicly known, thanks to the National Security Archive's acquisition and analysis of the Chiquita Papers, thus lending justification to the request.

Behind the strategy of the above-mentioned organizations is a hope that "the Court...expand the scope of its work beyond the military and political leaders it has pursued thus far, and to provide an international forum in which to try the employees of corporations involved in the commission of atrocity crimes. Unfortunately, the International Criminal Court's Statute, as written, will make it very difficult for such prosecutions to succeed."[78] The organizations are themselves aware of the limitations of the strategy in their explanation that the request was made (merely) on the basis of the requirement of Article 15 of the Rome Statute that ICC prosecutors "analyse the

[77] Prensa Cajar (2017). Press briefing: "Llevan a la CPI caso de ejecutivos de Chiquita Brands que financiaron paramilitares" https://www.youtube.com/watch?v=CjVyBXxuhQM&feature=youtu.be

[78] Wheeler, Caleb. 2018. "Evaluating the Likelihood of an ICC Prosecution for Crimes Committed by Chiquita Banana Employees in Colombia" https://rightsasusual.com/?p=1283 (Consulted: 19/09/20).

seriousness of the information [sic] [she] receive[s]."[79] In other words, the request for ICC intervention was likely made performatively and aspirationally, on the basis of a technicality, and with the knowledge that the Court's mandate likely bars any prosecution from coming from it. As put to me by an attorney who has worked on civil litigation against Chiquita, "The ICC would do it [prosecute] if a company was running a gas chamber" but would likely "end up seeing this as terrorist financing, which I don't really think it is. Terrorist financing is one thing, this is another because of the level of involvement it [Chiquita] had with the economic set up."[80] If the tools of the ICC are not equipped to elucidate or prosecute Chiquita's crimes, the question is why pursue such a strategy?

Baars offers an exhaustive exploration of this question, asking why "ICL is now again very much in fashion" and is "the accountability tool of choice" after a "4-decade dormancy" following Nuremberg (Baars 2017: 239-241). There is an argument to be made that ICL is wholly unnecessary, as it simply repeats domestic criminal law and requires an international jurisdictional playing field to be built (such as that of the ICC), thus eliding focus on enforcement of existing domestic law. As Schwarzeenberger stated against the performative nature of Nuremberg, "Practically speaking, the crimes covered by ICL are covered by domestic law in most cases, and a horizontal extension of jurisdiction, plus international cooperation on extradition, evidence gathering, etc. could be used to cover crimes committed by citizens abroad" (Baars 2017: 226).

In Chapter 1, I mentioned that ICL is a young area of the law, whose potential is seen to reside in its ability to curb the impunity gaps of IL. Baars, questioning ICL's promise and how its popularity has become "critique-proof," maps four different perspectives/camps within this legal trend. This space of contestation is heterogeneous with deep interpretative divisions, each with their own ramifications for the global political order. The above example of the Article 15 file employs a strategy of building political momentum around the eventual creation of a global jurisdictional playing field to adjudicate ICL at the ICC (beyond the core crimes and subjects for which it already has jurisdiction) (Wheeler 2018). This, however, is not the only relevant ICL

[79] Cajar *et al*. May 2017. "The contribution of Chiquita corporate officials to crimes against humanity in Colombia: Article 15 Communication to the International Criminal Court." Report for the International Criminal Court, the Hague.
[80] Anonymous informant #1 (2017, July 21, personal interview). Chicago, Illinois.

strategy. Yet another camp focuses on special crimes beyond those over which the ICC has established jurisdiction. From this perspective, a global institutional approach is less important than authorizing principles of international criminal law (which are themselves contested) into municipal criminal law, as has commonly been done with crimes relating to torture and, especially, illicit trade. In other words, that certain crimes have not been defined as core ICL crimes proper, has not prevented states from codifying them domestically as international criminal law (non *strictu sensu*), behind which collaborative enforcement and extradition between nations can follow suit (Baars 2017). Unlike the first strategy, this kind of strategy does not have the advantage of elucidating collective guilt for war crimes (crimes against humanity, genocide, torture, terrorism), as the ICC is equipped to do, at least in the event of state crimes. In other words, for some, the push for globally enforced ICL is purely ideological, borne of the humanitarian "need" to intervene in foreign jurisdictions, usually in post-colonies, for the protection of "higher" values.

I have pointed out two tendencies within the push for ICL enforcement. The first favors an institutional approach and the jurisdiction of the ICC over core international crimes, despite the fact that the Rome Statute eschews corporate subjects and some common international crimes. The second trend focuses on the way other international crimes that are not strictly ICL crimes are nonetheless prosecuted through state cooperation and domestic criminal law. This is especially true of crimes such as slavery and drug trafficking, for which international treaties have created jurisdiction for the domestic prosecution of crimes of an international nature.

What to make of this? Perhaps most importantly that ICL "concerns a factual, not a normative accountability gap, because the impunity can be traced back not to a lack of norms on international crimes, but on a lack of States' political will to prosecute" (Baars, 228). From this perspective, Baars' assertion that the momentum behind ICL is indeed more ideological than practical gains purchase. If state mechanisms *exist*, yet lack political will for enforcement, it seems impractical, or at least tangential, to "spirit away" (Baars) focus from state mechanisms to as-of-yet inexistent, or deficient, international jurisdiction, particularly in the case of international corporate crime, which is dogged by the limited Rome Statute.

Returning to Chiquita in Colombia, we have a clear example of this dynamic and of the impulses driving ICL strategies. Following Chiquita's guilty admission to the DOJ in 2007, a Medellin court conducted its own investigation and shelved the case, citing the company's defense that it had been extorted (*preclusión por extorsión*). Paramilitary testimony obtained through the Justice and Peace process caused the Fiscalía to reopen the case in 2012, which ended up getting moved in 2013 to a human rights section of the Fiscalía in Bogotá.[81] According to a lawyer at the José Alvear Restrepo Lawyer's Collective, "Este proceso pasó por diferentes despachos entre ellos una fiscalía delegada ante la Corte Suprema de Justicia de la verdad e impulsó el proceso, pero luego le bajaron el perfil al despacho en el que está, en el que por lo demás cambian cada rato de fiscal; esta es una táctica eficaz de impunidad porque cuando un funcionario conoce el expediente y se decide a hacer algo, lo cambian."[82] In spite of its discouraging progress, Colombia is, in many ways, actually better equipped to properly prosecute Chiquita's crimes than either international or US jurisdictions: in 2017 Fiscal Néstor Humberto Martínez announced that its office would consider financing of the AUC by businesses a crime against humanity. With this declaration, Colombia became more equipped, in terms of ready legal tools, to prosecute both individual Chiquita businessmen and Chiquita for an internationally codified crime, assuming there were political will to do so. Martínez's announcement was made in parallel to the 2017 decision that there would be no compulsory participation of "terceros" in the Jurisdicción Especial para la Paz, thus providing the business community incentive to do so voluntarily. In 2018, the fiscalía brought charges against 13 former Chiquita executives with crimes against humanity, including several U.S executives of the company.[83] "While these cases are in the very early stages, it is encouraging that they have been brought at all. It further demonstrates that, as it stands, domestic courts are probably the best option for litigating human rights violations committed in the context of corporate operations."[84]

2D: Conclusions: Ghosts of Reification

[81] Cajar attorney. Personal correspondence (email). (13/08/2018)
[82] Cajar attorney. Personal correspondence (email). (13/08/2018)
[83] Of course, the cooperation of the US judiciary on the extradition of these individuals in the event of prosecution in Colombia is unlikely.
[84] Wheeler, Caleb. 2018. "Evaluating the Likelihood of an ICC Prosecution for Crimes Committed by Chiquita Banana Employees in Colombia" https://rightsasusual.com/?p=1283 (Consulted: 19/09/20).

In this chapter, I have sought to understand "How many times can we try to get Chiquita and fail?", and to understand *why*. If the technical details are admittedly dizzying, from them I can glean two conclusions. First, that civil litigation against Chiquita in the U.S has all but died thanks to a drastic shift (relative the country's founding) in which state-centered approaches to international law have been cast aside in order to preserve Pirates, Incorporated. The justification for this shift has been a) to shift responsibility from state centered approaches to international forums and b) a focus on only *particular* human rights that can flourish in the "right" capitalist context. Meanwhile, Colombia may be better equipped legally, but poorly equipped politically to charge Chiquita executives for crimes against humanity, which leads cause lawyers to international strategies at the ICC, despite its lack of jurisdiction over certain crimes and subjects. In other words, all arrows point to aspirational, as-of-yet partially formulated international options, *despite* the only true obstacles to domestic solutions—whether in the U.S or Colombia—being political will.

Returning to Baars' argument about lawyers (even cause lawyers) congealing capitalism, the question must be asked, what is the sum effect of these trends within the corporate accountability movement? For one thing, they uphold entification and its mythologizing effects, in spite of the fact that, as explained in Chapter 1, reification is what makes jurisdictional "hopping" or "accumulation" possible in the first place.

Cause lawyers do have good reasons for pursuing entity-based solutions. Informant #2 provided me with two, as pertained to civil ATS litigation: the ability to attain discovery (though this, too, has been debilitated), [85] and the ability to gain greater funds for the relief of victims or, at best, companywide injunctive relief.[86]

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[85] "[…]The rules are now stacked against us […] It used to be that you could file a complaint, and if you know who the CEO or manager is in charge of Colombia was, you could use these words 'on information and belief John Doe approved the payments' and you didn't have to prove it. Then when you filed the case you would get discovery rights to do the deposition to get all of his documents. Well, in the *Ichball v Ashcraft* case the Supreme Court said that is pure speculation and that you need to have a sufficient factual basis to file your complaint. So you need to have discovery rights before you can file your complaint, and of course you don't. Knowing what officials did what before you get discovery makes it pretty hard to go after individual officials." Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C.

[86] "If you picked out one official of Drummond, Alfredo Araujo, and said you are responsible for this, so you get a damage or reward from him… he may not be able to pay the people…we have 680 victims of Drummond, so how much money does Araujo have? The court can also then order that this individual no longer do xyz, but unless the company is the defendant, you can't order companywide injunctive relief. For that you need the company to be named as well." Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C.

But there is another reason, and I suspect it is ideological. Informant #1 told me that having gotten down to "Colombian law and state law claims" against individuals "isn't going to do the job. It won't address the structural or historical issues that gave rise to it, it won't affect the way that Chiquita operates in any way." The goal of this "third pillar" approach, like at Nuremberg, is to make sweeping connections between business and conflict. I think, however, that much is lost when we accept entification and foist responsibility on Chiquita (or other corporations), rather than its human counterparts.

Consider the Black Lives Matter movement in the United States and the attention cellphone footage has given to *particular* police officers who have violently murdered black citizens. The reaction of the public to these heinous crimes has not just been to indict individual police officers as "bad apples" within an innocent system, but to indict the system of policing itself. With corporate accountability, the strategy seems to work the other way around—to indict the corporation first and its human counterparts second—because a strategy against individual executives "wouldn't do the job." I suspect it would, and could, if there were a broad-based movement to highlight the vast number of executives engaging in similar crimes. State law may not have the same appeal or "sexiness" of naming enemies of mankind or international criminals but seems to be a tool overlooked by the corporate accountability movement, nonetheless.

There is yet another loss in corporate accountability strategies that target the corporate entity. In Chapter 1, I said that the process of reification under the law forces individuals affected by a corporation's material acts to be forced into *relationship* with the immaterial and personless corporation. This process—particularly when it involves transnational litigation and solidarity—has an unintended affect in which the cause lawyer becomes a rights broker and victims "rights-entrepreneurs" (as described by Baars):

> *"In order for a claim to be valid and recognised, the human being must become a legal subject, she must articulate her needs, grievances and desires in legal vocabulary and in a western courtroom, through the mouth of a white man. She must 'join the system' in the same way that 'decolonised' peoples had to join the Western state system and European international law. As western lawyer I may think I am the enabler, the empowering medium in this equation but in fact I am the opposite, as I produce (constitute) the 'victim' and demand her surrender to my expertise, to become a rights-entrepreneur."*
>
> (Baars 2017: 296)

In this light, it is possible to see the practice of corporate accountability law as operationalizing a marketplace of rights in which their realization "becomes a matter of individual success or failure to negotiate" (115), to being "found" by the international NGO who will "visibilize" one's claim and bending to the possibilities of the system (ie. type of remedy available).

For these reasons, I am convinced that we have failed in our attempts to "get" Chiquita and have begun to ponder that the biggest issue of the corporate accountability movement is, perhaps, that it contributes to the mere idea that a corporate entity *can* be made accountable at all.

Interlude 2: Urabá of the 2010s

Image 3.Palm Panopticon
(J. Legato, 2013)

In Urabá, one feels the presence of what is absent.

Many of the bananas are gone, replaced by palm, like papering over the original wallpaper.

Chiquita has gone, or so it says, though I saw a shipping container there with its logo in the 2010s.

An ATS lawyer says to me:

"Notice how when they [Chiquita] finally pled guilty, because they had no choice, they then severed their relationship instantly with Banadex. The very next day the bananas came to Chiquita like they always do, they just came from a company that had a different management structure."[87]

[87] Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C.

Banadex became Banacol, and Banacol paid paramilitaries until at least 2012,[88] then helped fund the "No" campaign in the peace process plebiscite of 2016.[89] (But Chiquita wasn't there.)

The panopticon in Urabá is vegetative; once tracts of banana as far as the eye could see, now tracts of palm. And behind that expanse, that vastness, is the sinister absence-of-a-presence of paramilitarism.

It is hard not to think of Urabá's history in terms of a monopoly board. Sometimes the crops change. Sometimes the companies do or the armed actors, if only by name. Passing "go" is when the XVII Brigade lets the paras through to massacre and displace a community, or when justice is performed so things can go on the same. No one ever lands on "jail" though.

Once, I witnessed a community extend its humanitarian zone—the fenced in settlements meant to resist and subsist between the monocrops. "No armed actors allowed" they write on their fences. ELN, FARC, AUC, FFMM—Chiquita has paid them all. (But Chiquita is not there.)

Image 4.Displacement
(J. Legato, 2013)

[88] Comisión Intereclesial de Justicia y Paz. 2012. "*COLOMBIA: BANACOL empresa implicada en paramilitarismo y acaparamiento de tierras en Curvaradó y Jiguamiandó*" Report for FDCL (Germany), Transnational Institute (Netherlands), IGO (Poland) (Hands off the Land alliance).
[89] 13 October 2016. "Los cuestionamientos a los bananeros detrás del No." *Verdad Abierta*. Available at: https://verdadabierta.com/los-cuestionamientos-a-los-bananeros-detras-del-no/ (Consulted: 13/10/16).

The path from the fenced-in humanitarian zone to the river, the life source where dishes were washed, bodies were bathed, and fish were caught, was occupied by "invasores" or "colonos" in a large stucco house. These "colonists" used water buffalo to ruin community crops and claim it for palm.

"Vamos a tumbar esta casa," the community said, and, to my amazement, they did. I have it on video.

More amazing still, the XVII Brigade came, and then a helicopter carrying an assistant to the Minister of the Interior from Bogotá, and then the "colonists" (poor people in need of a job from Medellín) were called into the stucco house as well as the patrón (undoubtedly paramilitary) and I *was called in too, to watch, because I was "international" and "a member of civil society,"*[90] *and so I took notes on the whole affair.*

There ensued a long, heated conversation about vias de hecho *in reference to the sledgehammer that had been taken to the stucco house, and the eviction notice rendered by the members of the humanitarian zone, who, anyway, have collective ownership over the land (as upheld by the Constitutional Court) being occupied by the poor family from Medellin, who is paid by the paramilitary, who is paid by the businesses that put the palm oil in our shampoo and the bananas in our cereal.*

(The chain stops there because the business is a person but not made of people, or a pirate, but an incorporated one, or something like that.)

The humanitarian space extension worked. They have held on to that land. I was changed by seeing how effective the via de hecho *was, the sledgehammer between two hands, compared to the Law, compared to my field notes. Here is one of them:*

[90] I worked, at this time, for an international NGO as a "protective accompanier," which apparently makes one part of "civil society." See Peace Brigade International's (for whom I did not work) description of protective accompaniment here: https://www.peacebrigades.org/en/about-pbi/what-we-do/protective-accompaniment (Consulted: 14/15/19).

"Los blancos pueden dividir el territorio fácil. Nosotros no podemos porque somos integral…no podemos porque la tierra no nos pertenece, nosotros pertenecemos a ella."

Isn't it remarkable that for all the changing names and constantly moving pieces and human bodies on the monopoly board, some things don't change at all? That in 2012 we continue to speak of colonists in the Gulf of Urabá?

In 1928, they were communist workers and unionists. In the 90s and 00s, many were also workers and unionists, but now we call them all victims, human rights defenders, and land reclaimants (though the death sentence is the same). In the U.S, the union federation AFL-CIO has gone out of its way to congratulate Chiquita for its advances on labor rights (this was part of Chiquita's CSR campaign after it pled guilty in 2007). Unionists vs. human rights defenders! How did we get here*?*

Image 5. Displacement II
(J. Legato, 2011)

Yesterday it was United Fruit, today Chiquita (or Banacol?) Yesterday it was Jorge Elicier Gaitán cause lawyering in Congress, today it is Informants #1 and 2 from their non-governmental organizations. "Non-governmental," or from the perspective of the ICC, supra-governmental. What does it mean that 'government' has faded from view? As if the Colombian government did not need United Fruit for its nation-building project. As if the US government did not (does not) need Chiquita for its own. What have we lost by insisting the corporation is all powerful, eclipsing the state? How does this view keep us from seeing the intricacies of their mutual support? How new is the public-private partnership?

I, too, am a ficha *on the monopoly board of Urabá. A subject of the "ever mutating kaleidoscope of coalitions and cleavages" (Comaroff 2006: 27) of the international legal framework…*

Funny, isn't it, how I got here… (how did I get here?). How was traveling over trochas and in lanchas and through language barriers to meet so many hundreds of victims easier than meeting the Chiquita executives? And yet… isn't that who we (I) should be studying?

Chapter 3: Chiquita Brands and the Auditor State: A Lesson on the Neoliberal Ethics Trade & Transparent Secrecy

3A: Overview

> *"In general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands."*
> (Arendt, 1977: 246-47, citing a Pre-Trial Chamber decision on Adolf Eichmann)

> "*Ethics has become a trade, a market, a technique, and a profession, of which the compliance officer is the emblematic figure*."
> (Hibou 2012: 648)

In 1998, Mike Gallagher and Cameron McWhirter, investigative reporters at the *Cincinnati Enquirer*, published an 18 article exposé on Chiquita Brands, one of the city's biggest corporate players. The articles uncovered a litany of human and environmental rights abuses linked to Chiquita's operations in Central America. The reporting—largely based on leaked voicemail memos provided by a company employee—showed that Chiquita was a political heavy-weight with a monopolizing appetite, had close ties to the White House and other political arenas, and had notable experience in the circumvention of national and foreign laws through the creative (though not necessarily illegal) use of offshore accounts and convoluted corporate structuring that obscured its physical footprint while ensuring market expansion.[91]

[91] Edmonds, Kevin. 2013. "Revisiting the Cincinnati Enquirer vs. Chiquita." *NACLA*. Available at: https://nacla.org/blog/2013/7/4/revisiting-cincinnati-enquirer-vs-chiquita (Consulted 18/07/2018).

Simultaneously, the *Enquirer*'s source brought evidence before the U.S Security & Exchange Commission (SEC). Based on evidence of Chiquita having bribed port officials in Turbo, Colombia, the SEC opened a Foreign Corrupt Practices Act (FCPA) investigation, gaining access to the company's accounting books for a period of three years (1998-2001). In 2001, the SEC filed suit against Chiquita (*SEC v. Chiquita Brands International, Inc.*) for books and records and internal accounting control violations of the Securities & Exchanges Act of 1934. This action was settled with the SEC, precluding prosecution; Chiquita paid a civil penalty of $100,000 for its false records and inadequate internal controls, without admitting or denying the facts alleged in the SEC suit.[92] The SEC action evinced the facts of whether or not Chiquita had committed a crime, settling instead for improvements to Chiquita's bookkeeping and internal auditing system.

In the meanwhile, Chiquita had won a suit brought against the *Cincinnati Enquirer* immediately following publication of the exposé. The paper paid $10 million in damages to Chiquita, running retractions and full-page apologies for the articles. Journalist Mike Gallagher was fired and subsequently sued by Chiquita for defamation, trespass, civil conspiracy, fraud and violation of laws prohibiting the interception of private telephone communications.[93] Having revealed that Gallagher had accessed Chiquita's voicemails illegally, the content of the material was struck from the public record.

In the corporate malpractice treadmill of the 1990s, the public airing of Chiquita's sins might have ended here. The press had been cowed into submission and the SEC had chewed up Chiquita's accounting records, chock-full of illegal and unethical practices, and spit them out with new and improved cosmetic methods for achieving compliance.

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[92] U.S. Securities and Exchange Commission. 2001. "SEC Settles Case against Chiquita Brands." Accounting and Auditing Enforcement Release No. 1464, SEC v. Chiquita Brands International, Inc., Civ. Action No. 1:01CV02079 International, Inc., Litigation Release No. 17169, October 3, 2001 Washington, D.C. Available at: https://www.sec.gov/litigation/litreleases/lr17169.htm (Consulted: 08/10/2018).

[93] The New York Times. 25 September 1998. "Reporter Pleads Guilty in Theft Of Voice Mail." Available at: https://www.nytimes.com/1998/09/25/us/reporter-pleads-guilty-in-theft-of-voice-mail.html (Consulted: 08/10/2018). Oberlander, Lynn. 28 July 2011. "The Chiquita Phone-Hacking Scandal." The New Yorker. Available at: https://www.newyorker.com/news/news-desk/the-chiquita-phone-hacking-scandal (Consulted: 08/10/2018).

Instead, in 2003, a Chiquita board member and Chairman of the company audit committee brought new evidence of economic crime before the U.S Department of Justice. His name was Roderick Hills. Only a year into his tenure, Chiquita's General Counsel informed Hills and other board members that Chiquita was making payments to the Autodefensas Unidas de Colombia, a paramilitary outfit (since 2001) on the U.S Department of State terrorist list. Chiquita's counsel had brought this issue before the board before, though it was a board that preceded Hills's group; Hill and his fellow board members had been brought in in 2002 as Chiquita recovered from a 2001 bankruptcy file (Krehmeyer, *et al.* 2012).

Earlier, Hills had made a career as Chairman of the Securities & Exchange Commission. He had been a champion of a SEC program[94] that promoted the self-regulation of companies; if companies learned of dubious payments made to foreign officials (a common and largely accepted practice) through their internal audit process, they were to report said payments to the SEC, which would disclose them to shareholders[95] (Krehmeyer, *et al*. 2012, Cragg, *et al*. 2002). Coming from the corruption (soft) enforcement arm of the SEC, Hills would have been aware that the Department of Justice (DOJ) had joint enforcement responsibility for a terrorism financing case. While the SEC is responsible for fraudulent accounting reporting and securities regulation, the DOJ enforces suspect payments that are not covered by securities laws.

As the Business Roundtable Institute for Corporate Ethics points out, it was not unusual that Hills should bring Chiquita's crime before the DOJ as "…Hills very much continued to believe in this practice" of self-policing, as was the norm at the SEC (Krehmeyer, *et al.* 2012: 5). More broadly, the culture of financial corporate crime is such that, in the words of Duke University law professor James D. Cox, "This kind of conversation happens all the time. When you have a problem, you get on a plane with your lawyers to Washington and talk to the official involved and say, 'We have a problem.' That's the drill" (Krehmeyer, *et al.* 2012:1). In this way, in 2003 Hills found himself in Washington speaking with a DOJ official (a former law school classmate), discussing the AUC payments. The manner in which Hills went on to frame the "problems" with

[94] Program not named in report (Krehmeyer, *et al.* 2012), but I assume it to be the 1975 Voluntary Disclosure Program.
[95] The history of this program is covered in greater detail below.

the payments in terms of national security is significant to the argument being built in this chapter. But first, a brief history of joint SEC-DOJ enforcement of foreign corrupt practices.

The history of the foreign corrupt practices of U.S corporations, as we know it today, could be traced to 1944. The Bretton Woods Agreement pegged the post war economy to the U.S dollar, thereby increasing demand for the currency worldwide and increasing the power (and deepening the alliance) of U.S government and multinationals to establish the rules of international trade. For thirty years, U.S multinationals regularly bribed abroad in order to out compete foreign competitors. This practice was acknowledged and uncontested by U.S government, under the auspices of obtaining dominant market share for U.S companies (Cragg, *et al*. 2002).

In the early 70s this practice became known to the U.S public through the Watergate Scandal. Following the money trail of President Nixon's campaign meddling, the Senate Church Subcommittee found foreign involvement. The subsequent expansion of the investigation brought to light the widespread existence of corporate slush payments used not just to aid Nixon, but also foreign political or business parties (Cragg, *et al*. 2002). This was a watershed moment in which the political consciousness of the U.S public grappled for the first time with the global political reach of corporations.

Until now, the SEC had operated largely on the Securities Exchange Act of 1934. Following the Stock Market Crash and subsequent Depression of the 30s, the SEC mandate at this time hinged on ensuring financial transparency for shareholders, principally to avoid monopolization. The Watergate scandal, paired with the Vietnam war, created a "moral" (read: foreign policy) crisis in which the U.S felt it could lose its standing in the world if business practices were not brought into line with its democratic leadership "brand." In the Senate, however, many multinationals and legislators argued that U.S industry could not be competitive if foreign bribes were to be prosecuted in the U.S. The SEC was extremely resistant to policing corporate bribes abroad, arguing that such regulation did not fall within its enforcement capacities (Cragg, *et al*. 2002).

Two shifts in the governance of corruption resulted. First, the SEC launched a Voluntary Disclosure Program in 1975[96] which built on preexisting corporate governance structures of

[96] Roderick Hills would have been either a leader or disciple of this corporate self-policing program at the SEC.

auditing committees to improve standards and accountability on foreign bribes. Importantly, under this scheme, corporations were granted the authority to decide which of these types of payments were significant and should be reported to shareholders (Cragg, *et al*. 2002).

The Church senatorial subcommittee took a different approach. In pursuit of enforceable standards, the Church Subcommittee drafted a bill which would require corporations to disclose *all* foreign payments made by U.S corporations (as opposed to those they deemed significant under the voluntary scheme). The SEC insisted that full disclosure would be impossible to monitor. Finally, the disclosure requirement was dropped from the Church bill and in 1977 the Foreign Corrupt Practices Act (FCPA) was passed. The SEC's proposal had won: companies would now be legally responsible for setting up accounting controls and self-policing their suspect transactions.[97] This requirement would be jointly enforced by the SEC—in matters relating to securities laws—and in all other matters—by the Department of Justice (Cragg, *et al*. 2002). Rather than establish an enforceable and monitorable *policy on foreign bribery*, the FCPA had the narrower objective of corporate *disclosure of information* on bribes for the purpose of government protection of investors. In this framework, prosecution would largely hinge on reporting compliance "failures" rather than on crimes themselves.[98]

This historical division about the foreign policy objectives of the FCPA is significant. While one camp considered the management of foreign bribes by corporations to be an issue of maintaining the world's esteem for a "morally exemplary" United States, another camp emphasized the dominant retention of market share for U.S corporations. The FCPA that passed in 1977 erred toward the latter argument, putting the onus of internal control on companies themselves. In the years that followed, enforcement of the FCPA would change from administration to

[97] Interestingly, according to the SLC, "Chiquita's business activities (through its predecessor, United Brands) were central to the enactment of the FCPA by Congress." The business activities in question were "bribery payments made by United Fruit employees to a Honduran dictator and other officials" (SLC 2009: 78), as is popularly remembered.

[98] To understand the significance of voluntary reporting, it is helpful to see its bearing on Chiquita's own actions. The Turbo bribe, for example, had been discovered by Chiquita in an internal audit in 1997, though it was not reported to the SEC (as previously mentioned, the SEC's investigation of the bribe resulted from the *Cincinnati Enquirer* investigation). Later, in 2003, after Hills' disclosure about payments to armed groups in Colombia at the DOJ, the company reported concurrently to shareholders and the SEC for the first time that there were "Risks of International Operations" in Colombia. The SEC, of course, had had access to Chiquita's books for a number of years and was aware of the payments it made to guerrillas and paramilitaries, but stopped at admonishing Chiquita "to avoid vague references to risks in the future" in its FCPA reporting (SLC 2009: 158).

administration, as is diligently documented by Wesley Cragg and William Woof. For example, the "reason to know standard," in which corporate officers could be held accountable for bribery payments that they had reason to know about by virtue of their leadership position, was done away with by the Reagan administration. This meant that in the late 80's, executive officers could not be prosecuted unless there was evidence of direct knowledge of payments being used for illicit purposes. In contrast, an uptick in prosecutions followed the election of Clinton (Cragg & Woof 2002).

In spite of the variable political whims affecting FCPA enforcement, the FCPA has since its inception been a tool designed to function more as a rake than as a sieve. This moment in which the burden of compliance came to rest on the shoulders of corporations, rather than government, *for reasons of foreign policy and national security*, is today a principle baked into the day to day effectiveness of the FCPA. And, in the case of Chiquita, it has positive effects toward guaranteeing corporate immunity from the prosecution of financial crime.

Fast forward again to 2003. Chiquita board member Roderick Hills is disclosing Chiquita's "problem" to his law school buddy and DOJ contact Michael Chertoff. In attendance are more DOJ officials from the Office of the Attorney General and the Counterterrorism Division. Hills, a strong advocate of corporate self-policing and former designer of voluntary-disclosure policy at the SEC, explains that Chiquita cannot end its AUC payments for fear of murderous retribution to its employees. He explains that Chiquita is willing to sell its property in Colombia and leave the country, notwithstanding three foreign policy considerations that the DOJ should investigate: First, the U.S Department of State's recently announced financial grant to Colombia to disarm the AUC.[99] Second, that other U.S companies are involved in the same payments, and that the U.S would have to inform Colombia of the exit of multiple employers from the region. Finally, Hills offers to give the Department of Justice access to Chiquita's port in order to better understand AUC activity through clandestine operations.

[99] This assertion can be interpreted in a number of ways. In its most innocent interpretation, Hills seemed to have been nodding to the coordinated nature of government-corporate state-building, knowing that news of payments by a U.S corporation to a Department of State enemy would pit one force against the other. It is also possible to view this statement as a veiled threat; both Chiquita and the Department of State had allied themselves with Los Pepes. As each party aimed to put distance between themselves and Colombian paramilitary forces, Chiquita was in a privileged position to undermine the public face of Plan Colombia.

Wesley Cragg and William Woof offer a comprehensive study of the effectiveness of the FCPA since its passage in 1977, contextualizing the political economy under which various decisions were made. They establish the patterns and history of SEC and DOJ enforcement of the FCPA provisions, concluding that the FCPA has not had a notable effect on the bribery of foreign officials by U.S corporations. While the correlation between the ever-increasing competition of the globalized market and the growth of corruption is today taken for granted, the FCPA has not addressed U.S involvement in this phenomenon (Cragg, *et al*. 2002: 102). On the topic of the reach of FCPA investigations, the authors quote two FCPA specialized attorneys: "The uncomfortable fact…is that these few are the only [FCPA] prosecutions in almost twenty years. And many were uncovered not by the SEC or Department [of Justice] but *almost adventitiously by the press*" (Cragg, *et al*. 2002: 100, emphasis my own).

Such was the case, of course, with Chiquita Brands. If the FCPA has been ineffective in unearthing and punishing corruption, what *has* it accomplished? According to correspondents interviewed by Cragg and Woof, the greatest achievement of the FCPA has been that now a system exists in which "[c]orporations spend vast sums of money training employees in FCPA matters and employ a substantial number of lawyers and internal auditors who do nothing other than FCPA compliance work" (Cragg, *et al*. 2002: 100). Another correspondent, when asked what indicators exist of the FCPA's effectiveness answered: "a clear indication of the level of U.S corporate concern is the attendance at seminars on FCPA compliance" (Cragg, *et al*. 2002: 100). In sum, it would appear that the primary achievement of the FCPA has been to provide corporations with a tool that can document its efforts, investment, and voluntary goodwill toward combating corruption, without touching the crime itself.

Second, and equally important, the authors trace the lack of significant positive impact of the FCPA on corruption to U.S foreign policy, concluding that the moral imperative created by the Watergate scandal to reign in corporate economic crime did not hold up to U.S market interests over time. "It would appear in retrospect…that high standards of business conduct were not always compatible with the protection of national interests as they found expression in the foreign policy of ideologically diverse presidential administrations" (Cragg *et al.* 2002: 130). That is to say, the FCPA has largely been a political foreign policy tool used, since its passage in

1977, with great irregularity, and almost always with ineffective results in terms of combating corruption.

I have suggested that the FCPA is often more effective as a corporate legitimacy- manufacturing mechanism than as anti-corruption policy. In addition, I have pointed out the foreign policy tensions that gave rise to the legislation. If we look at Chiquita and take seriously the manner in which Hills presented the company's crimes to the Department of Justice, the interplay between foreign policy and corporate immunity are wholly visible. The FCPA includes a 'national security' exemption clause to protect multinationals who cooperate with the Central Intelligence Agency (CIA) or Drug Enforcement Administration (DEA) (Cragg, *et al*. 2002). It is now widely accepted that a correlation existed between U.S aid to the Colombian military and increased paramilitary attacks (Schwam-Baird 2015). Furthermore, U.S government documents obtained by the National Security Archive (NSA)[100] point to a tacit or explicit relationship[101] between U.S intelligence agencies and *Los Pepes*, the same paramilitary group through which Chiquita established ties to the AUC. According to the NSA:

> *While it is certain that the Task Force[102] was exchanging information with Castaño and Los Pepes, we do not know how long the Task Force maintained these ties and whether the relationship was sanctioned—either tacitly or explicitly—by U.S. participants in the Task Force, the Embassy, or at a more senior level of the U.S. government.[103]*

It is pure speculation that Chiquita may have been protected from FCPA prosecution due to CIA or DEA cooperation. Whether or not it happened, the FCPA allows for such exemptions, shining light on the importance of compliance mechanisms in maintaining joint state-building efforts between the private and public sector. Hills' offer of port access to the DOJ for clandestine operations against the AUC seems to acknowledge a transactional relationship where foreign policy or market advancement strategies supersede law enforcement. The FCPA can in this way

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[100] Not to be confused with the government's National Security Agency!

[101] According to an ATS lawyer who worked on the Chiquita class action, "It's absolutely true that the DEA and the CIA and U.S Embassy even were working with the paramilitaries, and they were kind of their guys, so they [SEC] did not want to open that can of worms and that explains a lot of what happened and what didn't happen." Anonymous informant #2 (2018, September 26, personal interview). Washington, D.C.

[102] Referring to Medellín's *Bloque de Búsqueda*

[103] National Security Archive. 2008, "Colombian Paramilitaries and the United States: "Unraveling the Pepes Tangled Web" February 17, 2008. Available at: https://nsarchive2.gwu.edu/NSAEBB/NSAEBB243/ (Consulted: 12/03/2018)

be used as a tool to commercialize ethics and allow companies and government to make cost/benefit analyses about crime, at the same time that they preach compliance, transparency, strict controls, and accountability.

To recap the circumstances of the SEC/DOJ investigations of Chiquita:

1. 1998: A series of damning articles about Chiquita's financial and other crimes are published in a widely-circulated newspaper.

2. 1998: the SEC opens an investigation into the accounting practices of Chiquita, gaining access to Chiquita's books during three years.

3. 2001: *SEC v. Chiquita Brands International* is settled without prosecution and without Chiquita's admission or denial of the alleged facts of having bribed Colombian port officials.

4. 1998-2003: The DOJ is not involved by the SEC to investigate crimes revealed by Chiquita's bookkeeping, including, but not limited to, financing the AUC.

5. 2003: Board member Roderick Hills learns of the AUC payments and discloses them himself to the DOJ (through a personal contact), making a case for the foreign policy implications of prosecuting Chiquita and the prosecutorial discretion merited by voluntary disclosure.

6. 2007: Chiquita admits to AUC payments and pays $25 million settlement to the DOJ.

Several circumstances are worth accenting here. First, that the SEC & DOJ only became involved because of the intervention of a journalist (in the first instance) and a board member (in the second). Second, that despite the mandate of joint SEC-DOJ enforcement of the FCPA, the SEC did not appear to involve the DOJ in investigations into the AUC payments, in defiance of the open access it had to Chiquita's books accounting for said payments *as they were occurring*. Third, both the SEC & DOJ applauded Chiquita's voluntary disclosure of their crimes, granting the company prosecutorial discretion.

In the months and years that followed, several events again pointed to the curious nature of "joint enforcement" at the SEC & DOJ. Following the 2007 public admission of the company, George Washington University's National Security Archive (NSA) research institute filed Freedom of Information Act Requests (FOIA) with the DOJ to obtain documents pertinent to their investigation of Chiquita. The DOJ, as a result, released approximately 5,500 pages to the NSA. Their contents included internal company memos, financial accounting of Chiquita's payments to the AUC, and analysis from Colombian and U.S lawyers discerning the (il)legality of the payments. These documents, published by the NSA, were deemed the Chiquita Papers.

In 2013, Chiquita sued the SEC to block its compliance with a similar FOIA request from the NSA. This action can be interpreted several ways. First, it's incontrovertible that the company saw the damage the Chiquita Papers (DOJ bundle) release had posed to its ability to present a plausible extortion defense in the various civil suits it was now fighting against Colombian plaintiffs and AUC victims. A half dozen suits had been filed by victims of AUC violence in the wake of its 2007 admission and were now pending in court. However, in light of a 2015 court decision permitting the SEC's compliance with the FOIA request, the documentation in the possession of the SEC (Chiquita Papers II) was also released, thereby making possible a comparison of the two agencies' investigations.[104]The SEC turned over 9,257 pages to the NSA, double the amount of the DOJ. These documents proved to be more sensitive, including secret testimony of seven high managers of Chiquita.

This begs the question: was the most sensitive information about the AUC payment scheme and company decision-making structure withheld from the DOJ by the SEC or, conversely, Chiquita? What role then does accounting compliance play in a governmentality that bypasses, diverts, or skirts criminal corporate accountability?

[104] I was unable to do such a comparison in full because the NSA has only published part of the SEC bundle. Instead of focusing on the content within the two bundles, to which I did not have full access, I focused on the way the NSA archive was produced. The page count alone is elucidating of the SEC's concealment. For the insight that the production and publication of an archive has as much 'to say' as the content of an archive itself, I credit the approach outlined by Cabrera and Gomez (2012) for working with "ephemeral documents."

Beatrice Hibou (2012) provides several elements to consider this question, as well as how it relates to the neoliberal order. For Hibou, many of us make assumptions about neoliberalism that merit correcting. First and foremost, we must not assume that the apparent failure of government to regulate corporate crime means that the corporation has eclipsed government authority. Second, and in order to better visualize her first position, we must acknowledge that neoliberalism is as much a political order as an economic one. Hibou's core thesis is that the state's *denunciation* of economic crime (independent of its ability to control it) helps the state to "redeploy its interventions." The naming of an "ill" (corruption, trafficking, terrorism) is the first step employed by neoliberal government to delegate and widen the sphere of its "government at a distance." Through this lens, we can debunk the ever-growing *common sense* that the state ineffectively regulates capitalism. After all, it is true that criminal activity has grown under, strengthened, and buttressed the neoliberal economy. Therefore, as Hibou points out, neoliberalism is driven by a paradox of the "reification of the rule of law and legitimacy at the same time there is a denouncement of the illegalities that are part of the state" (Hibou 2012: 644). In this world order, crime is not the antithesis of state authority. It is actually essential for state building.

Let us consider again the history of the passage of the FCPA, the law that would two decades later be brought to bear on Chiquita. Watergate and the Vietnam war, as Cragg and Woof point out, created a crisis for the U.S's moral authority on the world stage. One response to that crisis (and the resulting revelations of corporate interference in national and international politics) was to pass the FCPA. In doing so, the government denounced economic crime. It also redeployed its power, creating an (ineffective… or effective…) system in which (as cited above) "[c]orporations spend vast sums of money training employees in FCPA matters and employ a substantial number of lawyers and internal auditors who do nothing other than FCPA compliance work" (Cragg, *et al*. 2002:100). This system, as already discussed, helped to benefit corporations, national security, and U.S market dominance, without advancing accountability or minimizing foreign bribes. Furthermore, U.S foreign policy objectives are served, as imagined in the scenario of CIA-Chiquita-AUC collusion, or even as evidenced by Roderick Hills' dual admission-proposition to the Department of Justice. All of this, while still *denouncing* corporate crime.

Auditing measures, therefore, are a *modus vivendi* whereby lucrative yet socially abhorrent markets can simultaneously be denounced *and* left in place. This is a method of state-building that involves the state and economic actors (both licit and illicit). Hibou, in a statement about anti-money-laundering policy (which transfers readily to anti corruption policy as is explored in this chapter) notes that:

> *"Thus, anti-laundering policy is not measured by a reduction in the circulation of dirty money or in the number of detections of illegal flows or of sentences handed down, but by the existence within financial institutions of mechanisms and procedures for monitoring."*
>
> (Hibou 2012: 648)

The goal of the neoliberal auditor state is to delete "suspicious signals" not criminality itself.

Auditors aid in deftly diverting criminal charges away from the dominant actors of globalization. As Hibou points out, the existence of mafia or other scapegoats is indispensable to this state-building enterprise. For the borders between licit and illicit are left to be porous *up until a point*. The state allows a "border between legal and illegal [that] is often fuzzy" and "accepts inconsistencies in the application of legal rules." (Hibou 2012: 646). The border between licit and illicit may only come to bear with judicial action. In this way, for example, the Turbo port, once a nerve center of the AUC-Chiquita business relationship, is offered to the DOJ by Roderick Hills for covert operations. Such operations would only stand to aid the U.S in obfuscating further its CIA/DEA-AUC relations. Once their business partners, the mafia, or in this case paramilitaries, are an essential scapegoat for both the state and the corporation in the deployment of power. It's no wonder that many of the paramilitary businessmen from the banana bloc are often indignant toward their former *socios* when quoted in the press. In the words of Raúl Hasbún Mendoza, "*Aquí hay un concierto y el único condenado soy yo*."[105]

[105] Verdad Abierta. March 27, 2012. "El ex 'para' Raúl Hasbún protesta por preclusión a favor de bananeros." https://verdadabierta.com/ex-paramilitar-protesta-por-preclusion-a-favor-de-bananeros/ (Consulted 2/2/2019).

Hibou names this duplicitous trade in the condemnation/protection of economic crime the commercialization of ethics. In this trade, corporate and state compliance officers enjoy far-reaching latitude to pull the strings. "The fight against economic criminality passes less and less through public administrations such as police and justice, and more and more by the application of rules, standards, and procedures that are simultaneously defined by state actors and by private actors" (Hibou 2012: 655). Keeping this in mind, the apparent hierarchy revealed in the SEC-DOJ relationship in the Chiquita case is all the more significant.

If Hibou advocates for decentralizing the commonsense narrative that government and corporate powers are diametrically opposed, she is not either suggesting that these powers are always rowing in the same direction. In the fluid and unstable context of shifting borders of licit and illicit, enemies and allies, and tolerance and intolerance, there will always be tensions.

If the SEC/DOJ were aware of the AUC accounting scheme in the banana sector in Colombia, why did Chiquita take the fall instead of Dole or Del Monte? Can we attribute this entirely to a series of events that began with the *Cincinnati Enquirer* articles and, from there, Roderick Hills' renewal of the issue? As Hibou posits, economic crime "is generally known, accepted, and even tolerated until, at some point, a one-off intervention creates an example to show that the state knows what is happening and is in control, and to put an overambitious actor in his place…" (Hibou 2012: 654).

It is for this reason that a detailed review of the SEC and DOJ treatment of Chiquita, separately and as a collective, is so important, for the way the state manages criminality is a window into governmentality under the neoliberal project; not as a diminishing force beholden to corporations, but as one with wider webs of delegatory power.

To this end, the following sections rely heavily on the Special Litigation Committee (SLC) report, which, if not an unbiased account that includes the government's perspective on events, does nonetheless provide a wealth of information on internal dynamics within Chiquita, and the company's confidence in its standing before the government on relatively equal footing.

3B: "Not material from an audit perspective"

Section 3A provided a summary of the circumstances by which Chiquita came into the view of law enforcement. It further focused on the history of corruption and compliance enforcement in the US through the lens of the FCPA, arguing that the joint enforcement (or lack thereof) of the statute by the SEC and DOJ begs questions about the role of auditing in diverting economic crime from the judicial branch. Finally, I argued that close analysis of the role of these agencies vis a vis Chiquita's own criminal history can shed light on neoliberal delegatory governance, as well as the state-building purposes of corporate crime. Before moving on to the eventual involvement of the DOJ in Section C, a review of Chiquita's own auditing practices vis a vis the SEC is helpful to examine.

The FCPA has three elements: the first prohibits bribing foreign public officials, the second mandates accurate accounting books and records, and the third requires internal controls and document preservation. As previously mentioned, companies are allowed to determine which payments to report to the SEC. In Chiquita's case, it reported payments made to Colombian politicians and government entities but considered its guerrilla and Convivir[106] payments to eclipse the scope of the FCPA (despite the accurate books clause). The reason for this is that "The Company's Internal Audit Department developed a special accounting process for recording 'sensitive' payments" which it considered above bar after becoming convinced the payments were themselves legal (SLC 2009: 36).

There are some common and disparate threads in the way guerrilla and Convivir-AUC payments were accounted for. The first guerrilla payment was facilitated by handing off cash in a Guatemala hotel (SLC 2009:76). Subsequently, payments of $100,000-200,000 a year were accounted for on "1016" forms at Banadex. Employees drew guerrilla payments from accounts earmarked for "military transport,"[107] "general manager's expenses," or

[106] Convivirs were vigilante security groups that functioned (for a time) as the legal arm of the AUC and with the initial support of Colombian institutions. See Insight Crime, "The Legacy of Colombia's Vigilante Security: the Convivir": https://www.insightcrime.org/news/analysis/the-legacy-of-colombia-vigilante-security-the-convivir/

[107] The classification of funds destined to non-state militants under the guises of a state military apparatus says quite a bit about the delegatory role of state functions in a neoliberal economy.

"operations," sometimes annotating the purpose as security payments.[108] Despite the obvious misrepresentation, the SLC boasts that "the Internal Audit and Accounting Departments were able to track the payments on the Company's books and records adequately" (75). Additionally, Banadex employees with a high pay grade were required to submit quarterly reports detailing potential FCPA payments. Trends on these quarterly reports were analyzed by the Legal Department and shared with the Audit Committee in "FCPA Summaries." In the case of both guerrilla and Convivir-AUC payments, very deliberate care seems to have been taken to omit the disclosure of the information from quarterly reports to the Audit Committee, whose members (perhaps understandably) misinterpreted or downplayed the payments, until further circumstances (ie. crimes by the groups or legal investigation) necessitated further, but always carefully directed, disclosure. In terms of its payments to the FARC, the Audit Committee was kept in the dark until consultation with lawyers had convinced the Legal Department that the guerrilla payments were legal in Colombia (due to an extortion defense) and the U.S (based only on the analysis that guerrilla payments, as non-government payments, were not governed by the FCPA (SLC 2009: 80-81). Once confident of their legality, the Audit Committee began to receive disclosure of them in the FCPA Summary. In October 1997 the FARC was added to the State Department FTO list. The SLC was unable to ascertain if FARC payments continued after the FTO designation, but an apparent transition to Convivir-AUC payments took place soon after (the chain of command for which the SLC was not either able, or perhaps willing, to elucidate). Notably, Chiquita's payments to guerrillas were not subject to legal action by the SEC or DOJ. According to the analysis of the SLC, the company's Chapter 11 Bankruptcy file and restructuring in 2001 absolved it of any potential criminal wrongdoing in relation to the guerrilla payments (SLC 2009: 216-219).

As with the guerrilla payments, AUC payments were initially conducted by cash hand-off. These were formalized both through internal controls and externally, through the formation of Convivirs. Likewise, just as with the guerrilla payments, Convivir payments began to be included in the FCPA Summaries reviewed by the Audit Committee in 1997 once their

[108] It should be noted that the company's view of security payments has been central to litigation in the US. Security payments would mean that the company paid for services rendered, going against its extortion defense.

legality had been confirmed through Colombian counsel and the governor's office of Alvaro Uribe Velez (SLC 2009: 93). These were earmarked as "donation[s] to citizen reconnaissance group made at the request of the army" (94). Urabá payments to the AUC were initially funneled through the Puntepiedra and Tagua del Darien Convivirs. In 1999, additional payments began in Santa Marta, initially as cash payments to the AUC and then indirectly through Inversiones Manglar. When a Banadex employee discovered that Inversiones Manglar was not "a legitimate, properly licensed convivir," payments for both Urabá and Santa Marta were directed through the Tagua del Darien Convivir (101). Interestingly, Convivir payments were not included in FCPA Summaries in 1999, during the time of cash payments and this shift, though handwritten notes viewed by the SLC suggest that Convivirs were discussed at the corresponding Audit Committee meeting.

According to the SLC, Chiquita management became aware of the Convivir-AUC link in 2000 but continued to believe them legal (106). In 2001, FCPA Summaries again began to reflect Convivir payments. That year, the Easter (April) and Otterloo (November) "incidents," in which the AUC trafficked weapons through Chiquita's port facilities, occurred, as well as the placement of the AUC on the FTO (September). By November 2001, Chiquita was filing for bankruptcy and turning over the company board and CEO. In 2002, drugs were trafficked through Chiquita facilities. Around the same time, the Santa Marta AUC began to demand direct payments, claiming they were not receiving their share from the Tagua del Darien Convivir. A new procedure was thereby developed in which a Banadex manager's salary was inflated in order to make direct payments to the AUC. These were earmarked in the "manager expenses" account (121). According to the SLC, the manager complained about the risk to his safety posed by local reporting of his inflated salary; this conversation led Chiquita to investigate the AUC, and finally "discover" its FTO designation on February 20, 2003 (123). Chiquita again sought alternatives, discussing the possibility of flying in cash. Now aware of the FTO designation, outside counsel advised the company differently: "...the law did not allow the Company to do indirectly what it could not do directly" (124). Likewise, at this time accounting firm E &Y, which had audited Chiquita's sensitive payments for years, considering them "immaterial," (231) now saw them as material in light of the FTO designation. Payments ceased in Santa Marta at this time, but

continued to the "legal" Convivirs, while Roderick Hills' role on the Audit Committee would now lead to the company's decision to disclose its predicament to the Department of Justice.

On these facts, various elements stand out. First, the auditing process is set in motion only once payments are deemed legal. Despite the SLC's insistence that managers' in Cincinnati were unaware or uninvolved in aspects of decision-making in regards to the payments, citing "no documentary evidence," what is clear is that decisions were made constantly about the payments and their accounting, ie) shift from guerrilla to Convivir-AUC payments, shift from certain Convivirs to others. Furthermore, criminal payments were accounted for (prior to a 'legalized' accounting scheme) as petty cash within discretionary managerial accounts. Barring what Chiquita claims—that Banadex management was fully responsible for these decisions without the involvement of Cincinnati—it is impossible to believe that large changes to approved "operations" or "management" budgets could have taken place over so many years without high level decision makers in Cincinnati, and, most especially, the initial payments to both the guerrillas and AUC handled in cash, almost certainly taken from discretionary management accounts in Cincinnati. Most notable is the insistence that mislabeled payments were nonetheless trackable to those who needed to know, but naturally hidden from administrative employees who could remain unaware of their significance. From the SLC account, it is unclear whether members of the Audit Committee were truly in the dark or not about aspects of the payments, but it is clear that its function as a committee was to create a compliance paper trail parallel to the absent documentation at the level of management; furthermore, the starting level of information it received was filtered by the legal department, and almost certainly by management. It is interesting that greater care was taken to disclose sensitive payments to the Audit Committee around events that could have far-reaching legal repercussions for the company, both criminally and in terms of government oversight; in this way, Convivir payments were disclosed following the arms and drug trafficking incidents, while they were omitted in other reports. More broadly, the fact both Chiquita's inside and outside legal counsel, and inside and outside auditors, are laser focused on Colombian law, but only U.S law as concerns the FCPA is puzzling. All of these observations point towards my argument that compliance and transparency have far-reaching

leverage to divert and obfuscate both corporate and individual corporate officer criminal activity. What, then, *does* the FCPA *do*?

An accountant or FCPA practitioner may have a different view of this question. Without making claims as to the ways other companies operate in relation to this law and the SEC, my conclusion is that FCPA compliance auditing as a frontline skimmer of corporate crimes, at least in Chiquita's case, carries tremendous state-building capacity. In the aftermath of the exposure of Chiquita's crimes, the company had a very convenient, and very geopolitically privileged argument. According to its defense, Colombian management with paramilitary sympathies duped Cincinnati, until its supposedly robust internal auditing and reporting system "picked up" the payments. An elaborate compliance paper trail, with the help of the Audit Committee, was developed on the (wholly owned) subsidiary, opposite a non-existent or engineered paper trail of US-based management. The global capitalist class (Chapter 1) is thereby obscured; Banadex employees remain potentially vulnerable to liability, while Chiquita executives fade from view behind a curtain of 'existing compliance mechanisms.' For it is their mere existence that matters in corporate law, evidencing the "good faith" of company headquarters. The result is, on the one hand, comfort with illegality (and mass murder), especially following government disclosure. Roderick Hills, for example, "said that as the disclosures evolved and grew more specific over time, he felt increasingly comfortable with them" (SLC 2009: 144). Worse still, the superiority Chiquita enjoys because of its investment in compliance allows the SLC to conclude that "Chiquita has suffered significant harm" which "significantly diverted senior management and the Board from its main mission—working to grow and improve Chiquita's business for the benefit of its shareholders[109]" (32). The SLC ultimately concludes "that an event of this nature is unlikely to recur" (299) because the company "developed various enhancements to its compliance program that are designed to minimize to the greatest extent possible the chances that the Company will experience a problem of this type ever again" (193). One is left to wonder whether the problem was the traceability of financing the actors of Colombia's armed conflict, or having done it at all.

[109] Shareholders, who, as outlined in Chapter 1 are actually divested from company assets.

3C: DOJ Investigation

Early investigations & Sale of Banadex

Having pointed out the means by which both internal company accounting and SEC compliance divert accountability and delegate governance to the private sector, what can the details of the subsequent investigation by the DOJ elicit about corporate-government relations once, as Hibou put it, "a one-off intervention" unfolds to put an "overambitious [corporate] actor in his place" (Hibou 2012: 654). The DOJ investigation of Chiquita began with a meeting with Assistant Attorney General to the Criminal Division, Michael Chertoff, on April 23, 2003, and ended with Chiquita's guilty plea to making payments to a FTO in March 2007. The SLC report offers an "independent" report (financed by Chiquita) of the events that transpired throughout those four years, mainly based on the recollections and meeting minutes of various Chiquita personnel, and internal company documents. While DOJ officials are quoted, they were not interviewed for the report.

While the SLC description of CQB-DOJ "negotiations" span some one hundred pages, a general summary of the events goes as follows: On April 23, 2003, Chiquita made a voluntary disclosure to the DOJ (represented by Chertoff and Taxay) about it's "Colombia problem." Hills' raised the foreign policy implications of Chiquita's exit from Colombia, and explained the company's willingness to sell Banadex, change its accounting procedures, or cooperate in an undercover operation in exchange for prosecutorial discretion from the DOJ. Chertoff shared that the company's payments were illegal (and would remain illegal despite any possible accounting tactics) but, according to Chiquita representatives, came to understand the complexity of the issue (in view of foreign policy and employee safety), expressing the possibility of a policy-level solution.

As a result of the Chertoff meeting, Chiquita believed it had technically violated a terrorist financing law, that historic payments would not be prosecuted, and that future payments could possibly be made pending a solution from the DOJ. While Chiquita ceased payments for several months as it awaited said solution, ultimately payments resumed on May 8, 2003. During this period, both Chiquita's Audit Committee and Board, already aware of the "extorted" payments, were led to believe that a solution would be feasible with the DOJ. Their focus was on

improving the legality of their SEC and investor disclosures to reflect the reality of the information now known by the DOJ and the eventual possibility of an investigation. Chiquita management and counsel assessed that, as long as conversations with the DOJ were "still active at the highest levels," (SLC 2009: 112) it would be awarded for having "done the right thing" (214) in coming forward and would be permitted to be an "active participant" (130) in an undercover operation, or the negotiation of the sale of Banadex, both actions that would "fix" its liability. This optimistic position was somewhat tempered by a large degree of turnover at the DOJ, with Chertoff leaving for a judicial appointment and the case frequently passing hands.

In September of 2003, Chiquita disclosed that its payments had continued. The company enlisted KPMG, an auditing firm, to conduct independent accounting forensics on its sensitive payments and began a document "collection and preservation process" in the US and Colombia to be handed over to the DOJ, per its cooperation requirements. In December 2003, Chiquita learned of a concern at the DOJ that it was hiding documents, and became aware that the DOJ would conduct its own investigation, in parallel to the company's internal one. The company, seemingly serendipitously, came into the possession of two whistleblower confessions at this time, pointing to the connection of Banadex's Colombian management to the AUC. Simultaneously, the Board and Audit Committee were presented with new information about the breadth of Chiquita's "Colombia problem," including the whistleblower testimony, the Otterloo weapons trafficking incident, and drug trafficking. While these events had taken place months or years prior (getting resolved with the SEC and a former Board—see section 3B), the current Board was shocked to learn of them for the first time; now aware that the AUC presented more than an employee safety issue, they begin to advocate for the sale of Banadex to eliminate "the dangers and difficulties—both legal and operational" (156). Chiquita now began to release statements to investors about the "unstable environment" in Colombia. From the DOJ, the company again received the message that it needed to start cooperating, and that it was not interested in providing guidance on its (continued) illegal payment problem. Chiquita still believed the government had not provided a directive that it stop making payments, but division grew within Chiquita, both about the optimism of working with the DOJ (ie. on terms for the sale of Banadex or holding out hope for a policy solution and/or joint operation), and the meaning of "cooperation."

In early 2004, Chiquita's CEO was replaced by Fernando Aguirre, ostensibly to guide the company in its transition from farm ownership to fruit purchasing agreements[110] through a desired sale of Banadex to Banacol. On January 24, 2004, Chiquita made its final payment to the Convivir-AUC, a payment Aguirre reportedly learned of after the fact. "No other witnesses know how the payments ended" (SLC 2009: 165). On January 20, 2004, Chiquita presented possible terms of sale to Banacol to the DOJ, which expressed its own interest in acquiring a waiver of privilege to see the legal advice Chiquita had received prior to February 20, 2003 (the day Chiquita counsel "discovered" the FTO designation). By March 30, 2004, the DOJ had issued subpoenas to obtain this information. KPMG presented its accounting forensic analysis to the DOJ on the same date. On May 13, 2004 two important events took place: Nahmias (Counsel to the Assistant Attorney General) advised Chiquita that the US State Department had no policy objections to the prosecution of Chiquita and that it should proceed at its own risk with the sale, and the Chiquita Board approved the sale of Banadex to Banacol. The sale was completed on June 28, 2004, after which the DOJ requested a Thompson Memorandum Submission[111] in July, and a supplementary one in October. While a plea agreement had been drafted by a DOJ trial attorney, it was likely not approved. Instead, by the fall of 2005, a new Assistant US Attorney was put in charge of the case, taking the investigation in a new direction.

On September 8, 2005 US Assistant Attorney Malis took over the case, marking a newly aggressive approach from the DOJ. The DOJ demanded an expanded attorney-client privilege waiver in order to ascertain the legal counsel Chiquita had received between the FTO discovery and its final payment to the AUC. Consequently, the DOJ learned that the company had been advised to cease payments or leave Colombia, and company directors were subsequently subpoenaed. Malis further complained of Chiquita's lack of cooperation with the speed of

[110] This language, while benign, equates to a restructuring that could delete Chiquita's ownership footprint in Colombia.

[111] Each Attorney General administration outlines the criteria by which prosecutors should rate company cooperation and navigate prosecutorial discretion. The "Thompson Memo" of 2003, written by the George W. Bush appointee, was considered controversial and "tough" because it placed a high value on prosecutorial discretion in exchange for waived client-attorney privilege, as took place in Chiquita's case. The submission is an opportunity for an accused company and the involved executives to put forward an argument for prosecutorial leniency. Two months following Chiquita's submission, the Ashcroft Memo was issued, which required prosecutors to pursue the most serious offenses for which there is substantial evidence. With this in mind, it is difficult to understand how Chiquita's plea negotiations, coupled with the DOJ's possession of waived client-attorney privilege, resulted in the eventual plea deal that was struck.

document production, which led to the establishment of a weekly submission schedule. Since the DOJ was seeking testimony from Chiquita's lawyers, Chiquita brought in new lawyers, namely Eric Holder,[112] the future Attorney General. Holder estimated that trial costs to avoid a guilty plea would amount to $180 million dollars. As such, pleading guilty became the cheaper option, and a two-month negotiation over the terms of the plea took place.

Statute negotiation

At stake were three main issues: the statute to which the company would plead guilty, the amount it would be fined, and whether company cooperation of future investigations of executives would be precluded by the agreement. The SLC account outlines about seven offers (on the part of Chiquita) and counter-offers (on the part of the DOJ), before a deal was reached on March 17, 2007. At issue was the number of counts of either or both 50 USC § 1705 (knowingly engaging with a terrorist organization without permission from the Office of Foreign Assets Control) or 18 USC § 2339B (prohibiting material support of a terrorist organization). The latter is a more serious offense. Chiquita initially offered to plead guilty to two counts of § 1705 for the payments it made in 2003 and to pay a $1 million dollar fine, upon the condition of precluding future investigations. The terms of the final agreement were as follows: one violation of § 1705 for its payments between September 2001- January 2004, a $25 million dollar fine paid over five years, five years probation, and cooperation in future investigations. Chiquita's offers seemed to prioritize avoidance of statute § 2339B, the prosecution of payments after Chiquita's disclosure to the DOJ (considering such prosecution "inappropriate") and, initially, protecting directors from further investigation, at least for payments made after disclosure. For its part, per the SLC report, the DOJ claimed its focus was on payments made after the FTO designation, and on individuals. Furthermore, the DOJ initially demanded a $79 million fine, which Chiquita claimed was "unaffordable" (SLC 2009: 146-8). Eventually, having calculated the losses

[112] To continue the discussion on AG memos, the Holder Memo (2010) under the Obama administration was lenient in comparison to the Thompson and Ashcroft Memos. For example, the "requirement" to pursue the most serious offenses from the Ashcroft Memo was softened to the guideline that prosecutors should "ordinarily" pursue such offenses. Holder's prosecutorial discretion roadmap advocated for "individual assessments" and, especially, more permissive standards for the dismissal of charges contingent on the "substantial assistance" of the defendant. Holder is remembered today for his treatment of banks following the financial crash of 2008. He famously said, "Some of these institutions have become too large...it has an inhibiting impact on our ability to bring resolutions that I think would be more appropropriate," arguing that prosecuting banks for crimes posed too great a threat to the national or global economy. Holder's views and role in Chiquita's plea deal with the DOJ caused Jason Glaser to call him "Obama's banana problem" in a 2008 opinion piece in The Guardian.

associated with legal fees for managers and the probable loss of company credit as a result, Chiquita's board abandoned protection of directors as a term for the plea agreement. Nonetheless, Chiquita did fight to keep what it called "collateral issues" such as accounting and book details as well as individual names and titles out of the criminal information provided in the factual proffer. This was denied by the DOJ, though the FOIA bundle later attained by the National Security Archive was thus redacted.

Negotiation of the treatment of individuals

Several assessments prompted the board to abandon its initial attempt to defend its managers in negotiations: the managers' legal fees during continued investigations and in the eventuality of prosecution, the reputational damage to the company, the inability of indicted individuals to perform their duties, and the risk to the company's access to credit (SLC 2009: 266). According to the SLC report, which outlines a lengthy legal defense of the managers (on the basis of corporate law and the principle of business judgment), the directors' are not only free of liability, but also received appropriate retirement bonuses or severance pay, which are outlined and (ostensibly) justified. If the DOJ had initially adopted an aggressive stance during the plea negotiations, it ultimately seems to have dulled its approach in going after the individuals responsible for the crimes to which the company was now admittedly guilty. According to the SLC, "Consistent with that [plea] agreement, following the Company's guilty plea, DOJ continued its investigation of individuals for several months. As part of that investigation, the Company made Larry Urgenson and Audrey Harris of K&E available to DOJ, and DOJ required Urgenson to undergo multiple interviews and testify before the grand jury (SLC 2009: 267). Also in defense of the managers' cooperation with investigations, the SLC quotes a section of the plea as follows: Chiquita "agrees to cooperate fully, completely and truthfully with all investigators and attorneys of the government, by truthfully providing *all information in your client's possession* relating directly or indirectly to all criminal activity and related matters which concern the subject matter of this Investigation" (SLC 2009: 267, emphasis my own).

Analysis: "Not Simply Criminal Enforcement Issues"

What does the above account tell us about neoliberal governmentality? From the perspective of Hibou's lens, in which justice and policing take a backseat to standards and procedures

negotiated between public and private actors (behind closed doors), what stands out, especially from Chiquita's initial disclosure in the Chertoff meeting, is the meeting of equals. While several Chiquita managers first made contact with the DOJ anonymously (withholding specific details about the payments, such as the country and groups involved), it was under Hills' direction that the Chiquita board then decided to "make a full and voluntary disclosure of the Company's predicament in Colombia and seek *guidance* on how to proceed" (SLC 2009: 127, emphasis my own). Hills and Chertoff had "known each other for 25 years" (130-131) but, according to Hills, Chertoff was the person to approach because he "was positioned high enough in the DOJ hierarchy to address the broader policy implications of the Company's predicament in Colombia" (130). High-level negotiating, in other words, is the realm of prosecutorial discretion, in which senior officials can ignore the law in favor, in this case, of a) corporate cooperation in an undercover operation or b) negotiated terms of sale of a foreign subsidiary.

To Hill's suggestion that remedied accounting procedures could temper the illegality of the payments, Chertoff assured Hills they would be illegal all the same. To this, "Hills responded that if DOJ sought to enforce a 'black and white rule' against making payments to the AUC or another FTO in Colombia, the result would be a 'mass exodus' of U.S. companies from Colombia" (130). At this, Chertoff reportedly softened, accepting the complexity of the situation, which he offered to consult on with other government agencies. The seeming ample distance between norms and their interpretation are deepened in these spaces; Hills, for his part, reported to the SLC that he did not specifically ask Chertoff whether payments could continue because he knew that DOJ "could not *explicitly authorize co*nduct that constituted a crime," and he did not want to ask a question that "*would back the government into a corner and force it to provide a negative response"* (133, emphasis my own). Through these examples, the simultaneous definition of criminality between high-ranking private and public actors is visible, and perhaps more so, the improbability that such an egregious felony by a corporation, especially abroad, could "Simply [constitute] criminal enforcement issues" (SLC 2009: 132).

3D: Conclusions

"Skilled revelation of skilled concealment"

In this chapter, I have engaged with the idea that corporate ethics is a market mediated by compliance officers and, as the DOJ account shows, one-off conversations among high ranking public and private officials, or through legal memos, and further argue that such practices accomplish state-building effects for US empire—not between public and private parties that are necessarily at odds (though they can be at specific junctures), but as a shared apparatus of delegated governance. That ethics has been monetized is perhaps part of the common sense of our historical moment, but is still shocking when put as plainly as Robert Kistinger, former President of Chiquita Brands International, did:

"You have to view this as being a normal expenditure of running this operation. Okay? So just like they would go out and spend money on fertilizers and agrochemicals and transport to wharf and what loading costs and stevedoring costs and things of that nature, this is an ongoing cost of this business is the way its operating: so, therefore, it is included as an ongoing cost. Not as "guerrilla payments."[113]

What to make of the fact that, at least in Chiquita's case, we do not need to rest on the laurels of assumed corporate malfeasance? That transparency politics were supposedly enacted? What to make of the fact that Chiquita's crimes have been *visible* for thirteen years, continue to be incredibly relevant to the Colombian post-conflict, but have not led to any accountability beyond the DOJ fine? What happens when exposure does not have the desired "catalytic effect"? (Birchall 2016). Cultural studies offers some important concepts to understand the management of popular secrecy (Birchall 2016, Bratich 2007, Hall, G. 2007).

From one perspective in cultural studies, secrecy is seen as a social process in which the secret is itself neutral, but the politics or ethics of a "particular distribution" of the visible is what matters (Birchall 2016: 152). While revelation, visibility, transparency, and coming into knowledge (in the words of Birchall) remain important, they are not *enough* to mobilize political transformation in the current conjuncture and, I would add, particularly given the central role of transparency in

[113] National Security Archive. 2017, "The New Chiquita Papers: Secret Testimony and Internal Records Identify Banana Executives who Bankrolled Terror in Colombia." April 24, 2017. "The New Chiquita Papers" https://nsarchive.gwu.edu/briefing-book/colombia-chiquita-papers/2017-04-24/new-chiquita-papers-secret-testimony-internal-records-identify-banana-executives-who-bankrolled

neoliberal governmentality. As Bratich puts it, our "faith in publicity as a truth-telling strategy to expose, and ultimately neutralize, power's machinations" (2007: 44) is, perhaps, misguided as a singular focus.

Worse still, the revelation of a scandal can "merely serve[s] to regenerate and restore faith in the inherently scandalous system and logic of capitalist democracy" (Birchall 2016: 155) and even intensify and redistribute a secret, rather than end it (Bratich 2007: 42). As with Chiquita's accounting books, audit committee memos, and the SLC report analyzed in this chapter, "documents that aim to reveal can be used to conceal what they reveal" (Birchall 2016:157). Were not Chiquita's many fictions—of extortion, of falling victim to wily Colombian managers, of the ignorance of management in Cincinnati, even of falling victim to "aggressive" government sanction—ultimately reinforced (or at least unaddressed) by both the SEC and DOJ investigations? Were not Chiquita's secrets, "revealed" as they may be, intensified and redistributed by the DOJ? And, for that matter, the shared secrets of an entire cadre of US companies who acted similarly in their financing of the armed conflict in Colombia? Publicity of the covert can be as strategic as its concealment. Bratich names this tactic "spectacular secrecy" for its deployment of spectacle. What, afterall, did a payment of 25 million dollars, paid over five years, mean to a company like Chiquita, who paid millions to Colombian armed groups through discretionary spending accounts? Who compared such costs to operational budgets for "fertilizers and agrochemicals"? Who reportedly discussed at an audit committee meeting "to just let [the DOJ] sue us, come after us. This is also CEO's opinion" (SLC 2009: 251). It would seem that the return on Chiquita's "investment" to the AUC, even taking into account a legal fine about twenty times as large as the initial investment (not to mention the legal costs the company still incurs from civil suits), was *that* appealing. Spectacle aside, it would seem both the DOJ and Chiquita gained a lot of control—from the perspective of secrecy management and accountability—from the company's guilty plea.

Today's political environment requires more than speaking truth to power or revealing facts. "...Secret traditions are preserved by being out in the open, hidden in plain sight while interpretable only by a select few" (Bratich 2007:45) (think: FCPA lawyers). According to both Bratich and Birchall, what is needed in the current conjuncture, is not the revelation of the secret

as much as the revelation of "revelation management" and the very visibility of secrecy. "What can be learned *from* the secret, not just about it?" (Bratich 2007: 47). In this chapter I have focused on several conclusions in this vein: first, the manner in which exposure or whistleblowing is combatted or managed; second, the ethics trade mediated by neoliberal compliance and state agencies such as the SEC, which "spirit away" the traditional or believed role of justice; third, the role of justice itself (DOJ) in exercising selective and limited punishment to restore faith in the functionality of the system (of concealment); and fourth, the delegatory governance and state-building foreign policy implications (in the service of US empire) of the above listed conclusions.

So what to make of the power of social movements within this state of affairs? To this question, I offer several reflections. First, "our obsession with secrecy as a box to be opened is itself part of the spectacle, a distraction from the myriad ways generalized secrecy permeates the political body" (Bratich 2007: 47). I do not at all wish to suggest that revelation is not an important political tool. As has been said to me often by those who know the Chiquita case well, the National Security Archive already did much of "the work" through its ever-important FOIA work and publication of the Chiquita Papers. What I wish to suggest is that the work continues, and cultural studies offers tools for the "skilled revelation of skilled concealment," as I have attempted to do in this chapter. Our own obsession with "opening the box" of truth can make us part and party to spectacular truth. I myself have been challenged throughout this thesis to not follow the entirely fascinating leads of the roles of particular paramilitaries and politicians in the Chiquita case in order to focus on the function of the secret, beyond the secret itself, beyond, as Kregg Hetherington puts it, the desire to find "or somehow manufacture transparency" from archives that are themselves part and parcel of the spectacle (Hetherington 2009: 5). Anyway, should it be the state that has full reign of the secret, or should our social movements as well? If we view secrecy itself as neutral, but its particular distributions as the terrain for political transformation, what power can be gained from engaging with the state's own well-hued politics of secrecy management and spectacle? One such example is evident in the unusual use by social

leaders (in the region in which Chiquita financed the paramilitary apparatus) of masks in 2017, a tactic which outlet *El Pais* called the "ridiculización de la tragedia."[114]

Image 6. "Ridiculizing tragedy"[115]

Social leaders from Urabá wear masks at a press conference to protect their identities. Nearly 100 social leaders were killed in Colombia in 2017, many by paramilitary successor groups.

It strikes me that this visual of masking is the corollary of masking afforded Chiquita's executives by its corporate structure and the US government. This action was a deliberate departure from the tactics of visibility and transparency generally used by social leaders in Colombia, with the help of the international community. In what ways can the Left and social movements work with the reality of "occulted presence," above and beyond calls for transparency? (Bratich 2007). What if visibility is a sure risk to life, as is so clear in Colombia?

[114]El Pais. 26 December 2017. "La foto del terror y la ridiculización de la tragedia: En 2017 han sido asesinados en Colombia alrededor de un centenar de líderes sociales." https://elpais.com/internacional/2017/12/26/colombia/1514244097_950757.html (Consulted: 26/12/2017).
[115] Picture from: Revista Semana. 14 December 2017. "Líderes sociales denuncian con máscaras que podrían ser asesinados" https://www.semana.com/nacion/articulo/lideres-sociales-denuncian-con-mascaras-que-podrian-ser-asesinados/550712/ (Consulted 14/12/2017).

Should we take more seriously the possibility that the publicity of secrets is always a progressive force (Bratich 2007)? What tactics are possible if we don't?

Breaking free of revelation/concealment dichotomy

One exploration of this question comes from Kregg Hetherington's "Guerrilla Auditors and Duplicitous Documents: Information, Transparency, and Land Struggles in Paraguay" (2009). Hetherington research shows how, following the Cold War, the popular land reform movement in Paraguay shifted onto the plane of bureaucratic procedure. Ideals of transparency and good governance necessitated this turn to the supposedly depoliticized realm of bureaucracy. What Hetherington discovers, much to his own chagrin, is that bureaucratic documentation is in and of itself meaningless; so copious, so self-contradicting, and ubiquitous is documentation in the age of transparency, that it is rendered fetish. Fethishized as they are, "documents appear to have power only because they elide the material relations behind them" (Hetherington 2009: 9) or, put another way, the document-fetish (or spectacle) of the inscription of information on paper renders invisible the power relations deployed in their *movement.* For transparency to truly be achieved, we need to focus as much on the movement of paper as its contents, "for there [is] no useful distinction between information and bureaucratic process, between content and form, between record and politics, or between history and the aesthetic of inscription" (Hetherington 2009: 4).

Hetherington learns this lesson from the campesinos he calls "guerrilla auditors," who see beyond the fetish of transparency, the supposed defacto nature of paper, deducing that it is the *interpretation* of documents that give them, and the State, their power:

> *Guerrilla auditing (in fact most effective campesino politics) was made possible by the understanding that bureaucracy, and the legal power that it wields, is nothing more than the creation, circulation and endless interpretation of documents. For campesinos, information does not exist in documents, nor does it exist prior to documents, merely to be inscribed there by a state that seeks to control its citizens. Information, and therefore state power itself, arises not so much in the inscription of documents as in their reading. Documents do not store information from the past for the present, but make information possible. Information, in other words, is a quality of documents that always belongs to the document's future as a form of possibility.*
>
> (Hetherington 2009: 4)

"Documents, like any other signifying device, cannot have stable meanings" (Hetherington 2009: 9). The work of a guerrilla auditor then, is to create the possibility for political action by creating files, keeping track of the movements of multiple related documents, and controlling their interpretation.

Conclusions

To bring these lessons to bear on Chiquita, several conclusions are worth highlighting. First, my initial fear that I could not shed more truth on the facts of the Chiquita case, plus the refrain I have heard by those knowledgeable of the case that either the Cincinnati Enquirer or National Security Archive had already done the (excellent) work of revealing the truth, are both unfounded. As neoliberal governmentality knows, the work of interpreting documents never ends. María Fernanda Cabal, as mentioned in the introduction, is entirely aware of this when she not so ignorantly (or innocently) claims that the banana massacre of 1928 didn't occur. Nor are Gabriel García Marquez's *One Hundred Years of Solitude* or José Alejandro Restrepo's *Musa paradisiaca* (1996-2016) which memorialized the forgetting and oblivion surrounding the crimes of both United Fruit and Chiquita (as the same historical entity).

By pointing out the commodification of ethics within compliance culture, my aim has been to explore new areas for the thousands of victims of Chiquita and other US corporate crimes in Colombia to, just as the guerrilla auditors of Paraguay, politicize areas of bureaucratic proceduralism that we ideologically deem apolitical. If the SEC is a skimmer that "spirits away" accountability from the DOJ, for example, then equal attention must be paid to these "lesser" institutions. More than (or at least as much as) a politics of revelation, which can make the transparency advocate part of the spectacle, this age of popular secrecy demands our right to *look* as much as to *see*, to manage *visuality* as much as *visibility* (Birchall 2016: 156). If secrets are preserved by being out in the open but interpretable only by a few (Bratich 2007, Hetherington 2009), then mechanisms such as the FCPA are every bit as political as more popularly referenced legal mechanisms coming from the human rights movement. Compliance officers should be met with guerrilla auditors. A starting point for this contestation, in the case of Chiquita, would be to

thoroughly cross reference the SEC (Chiquita Papers II) and DOJ (Chiquita Papers) paper trail.[116]

Finally, as Gary Hall (2007) points out, the face of empire (or as I have expressed it here, neoliberal governmentality) changes, but there is nothing that is absolutely new: "any attempt to invent an absolutely new politics just risks unknowingly repeating the old anyway" (Hall 2007, 78). As the social leaders from Urabá showed through their collective masking, perhaps working *with* secrecy is also an option with untapped political possibilities. Cultural studies, after all, is less about reproducing "than performatively inventing it[self], each time, *without any guarantees*" (Hall 2007: 78).

OUTRO: SOME PERSONAL RECKONINGS

Throughout this master's and thesis in cultural studies, I have taken seriously the field's instruction to investigate one's disenchantments. In this way, these pages reflect my personal disillusionments—with corporate accountability and human rights, with the justice system and transparency vis a vis my observations of Chiquita Brands judicial history—but I would be remiss to represent this process as having been a comfortable or self-assured one. In some ways, my biggest hope for this thesis is to one day look back on it to discover that I was cynical and wrong in many respects. Afterall, the law is as much disputed territory for the definition, representation, and implementation of truth, memory, and justice as any other area of culture…*and yet*, that, too, is a simplification of the historical-materialist and anti-positivistic elements highlighted in Chapters 1 and 2. How then, to engage with law, to maintain hope for change, even while making space for real debate about Law's inherent violence (even in spite of, or alongside, the best efforts of do-gooders, cause lawyers, and human rights activists)? Put plainly, it has not felt particularly easy to highlight some of the power dynamics addressed in this thesis while protagonists of the far Right in Colombia (and elsewhere) undermine the human rights project and uplift national sovereignty over the "interventionism" of the international community and international tribunals, while quite literally burying the genocide and impunity

[116] The National Security Archive published the Chiquita Papers in full, but not the second batch. In the beginning of this chapter, I made the case for why such an analysis is important.

that has benefitted it in this country for decades. On the other hand, so effective has the assault been on human rights (and, as I have learned through this investigation, so articulated have human rights been through their entire history with neoliberal architects) that it cannot be heresy for the Left to review what strategies can and should be added to the internationalist's toolbox. This is particularly true when it comes to corporate, rather than state, accountability, and the special problems presented by the historic and fictitious division of the private and public realms. How else can we begin to untangle the appearance of increasingly ridiculous (or oddly coherent?) headlines such as "Corporate lawyer linked to displacement is the new human rights Ombudsman of Urabá"?[117] Human rights are on everyone's lips, from all swaths of the political spectrum; that they seem to be losing their very meaning does not mean that we should abandon ship, but maybe it should be an invitation to broaden our historical and contextual view of the myriad ways they have been deployed in not-so-distant history.

If I sidestep completely my own self-conscious reticence and confusion about the international human rights movement and the ways it operates today, I hope that this thesis has contributed, even meagerly, to the development of what I believe are tools worth sharpening and accompanying the international corporate accountability movement: 1) first and foremost, remembering that the birth of the modern Anglo-Saxon corporation, in the form it took, was once far from inevitable, in order to challenge what the corporation *is* legally and materially, especially in terms of limited liability, rather than focusing exclusively on the optimistic "accountability" of an "amoral calculator" (Baars 2017); 2) expanding the corporate accountability movement to include "lesser" bureaucracies beyond the justice system (which have gained power under neoliberalism), particularly those responsible for compliance, like the SEC; 3) carefully engaging with creative state-based mechanisms, even as supra-national legal strategies are sought; 4) more rigorous engagement with spectacular secrecy and revelation management, recognizing that a singular goal of transparency falls short, and can even make the

[117] Rueda Forero, Sebastian. 4 March 2021. "Abogado de empresarios vinculados al despojo es el nuevo defensor del pueblo en Urabá." El Espectador. Available at: https://www.elespectador.com/colombia2020/pais/abogado-de-empresarios-vinculados-al-despojo-es-el-nuevo-defensor-del-pueblo-en-uraba/?fbclid=IwAR0MQ46Kq0GVrr48qynA8iXt97-0HYMk5IUKAKfoiZSWqWYfn5rbvvLRKh8 (Consulted 5/9/2021).

“revealers” party to spectacle and; 4) ongoing engagement with documents (sparse as archives on corporate malfeasance are) that eclipses their content or original purpose, looking instead to audit like the campesino “guerrillas” of Paraguay.

To close, a final plea to academia and activists alike who are concerned with business in conflict: an anthropology of the corporation is every bit as necessary as anthropology of the state (in the style of Abrams 1977, Gupta and Ferguson 2001, Mitchell 2002, and Wacquant 2012). In tracing the legal treatment of the crimes of one corporation over time, I have tried to contribute to a methodology for investigating the dialectical, nation-building relationship between the private and public, with the intention of blurring and problematizing this historical bifurcation. Anyone interested in, affected by, and adverse to the murderous behavior of multinationals in Colombia today and its ongoing impunity will be well-served, I believe, by continued development of a much-needed area of investigation in the country—a history of the corporate form (ie. from the hacienda to SAS corporation) and the relationship of said form to the national and international legal system. This research must go beyond our current moment to know where we are situated and to what end our popular tools of today can be most effective; for decolonization is not just a metaphor, but a political project that requires the return of land, legal space, and power to the colonized and dispossessed.

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